

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
LOT 31 ASSOCIATES, L.L.C.
 Applicant

Douglas M. Firstenberg
 Lamont Hoffman
 Meral Iskir
 Douglas Wrenn
 Anne Dowell
 Frank Bossong, IV
 Martin J. Wells

For the Application

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 Attorneys for the Applicant

Zoning Application No. G-850

Martin Klauber, People's Counsel

In Support of the Application

Elizabeth Davison, DHCA
 William F. Siebert, III, DPW&T

Government Witnesses in Support

Martin J. Hutt, Esquire
 William M. Deyhle

Community Participants

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. EXECUTIVE SUMMARY

Applicant:	Lot 31 Associates, LLC
LMA No. & Date of Filing:	G-850, filed February 24, 2006
Current Zone and Use:	Lots 138 and 139, and part of Lots 18 through 24, in the R-60 Zone, are used as Parking Lot 31. The northern portions of Lots 18 and 19, in the CBD-1 Zone, are used as a Parking Lot 31A.
Zoning and Use Sought:	LMA G-850 is to rezone all lots to the TS-M Zone, intending to construct two Mixed-Use Residential/Retail buildings, with subsurface public and private parking.
Location:	Woodmont Avenue, about 1500 feet South of Bethesda Metro Station
Area to be Rezoned:	133,738 sq. ft. Net Lot; 143,819 sq. ft. gross tract (3.3 acres)
Density Permitted in TS-M Zone:	3.0 FAR
Density Planned:	2.59 FAR, 250 Dwelling Units, Max., including 32 MPDUs (12.5%) and 35 workforce housing units on 332,500 square feet of floor area; 40,000 sq. ft. of retail. Total Floor Area: 372,500 sq.ft.
Public Use Space:	Proposed: 10% (Binding 10%)
Active & Passive Recreation Space:	Proposed: 25% (Binding 25%)
Parking Planned:	1480 spaces (342 private spaces for residents; 1138 public spaces)
Height Planned:	65 feet, max, West of Woodmont; 90 feet, max, East of Woodmont
Traffic & Environmental Issues:	Realignment of Woodmont; possible slowing of traffic at intersection
Zoning Issues:	Sector Plan's recommendation for zoning & height east of Woodmont (<i>i.e.</i> , on Lot 31A)
Consistency with Master Plan:	Rezoning to the TS-M Zone is consistent with the recommendation of the Bethesda CBD Sector Plan for Lot 31, but not for Lot 31A; however, re-zoning to TS-M, even on Lot 31A, is consistent with a recent amendment of the Zoning Ordinance and with the goals of the Sector Plan. Moreover, recent development around Lot 31A makes it more compatible with a height greater than the 75 feet recommended in the Sector Plan
Neighborhood Response:	No opposition after negotiations
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Application No. G-850, filed on March 7, 2006 by Lot 31 Associates, requests reclassification of approximately 3.3 acres of County-owned land in downtown Bethesda from the R-60 and CBD-1 Zones to the TS-M Zone (Transit Station-Mixed). Applicant seeks to rezone lots 138, 139 and part of lots 18 – 24, Block B of the Miller’s Addition Subdivision in Bethesda, a site which is located on both the southwest and southeast quadrants of the intersection of Bethesda and Woodmont Avenues. The portion west of Woodmont Avenue is currently occupied by Parking Lot 31, and it is in the Arlington Road District of the 1994 Bethesda CBD Sector Plan. The portion east of Woodmont Avenue is currently occupied by Parking Lot 31-A, and it is in the Wisconsin South Corridor of the Sector Plan. The site will be developed with an underground garage containing 1138 public and 342 private spaces (*i.e.*, totaling 1480 parking spaces), and a mixed-use residential/retail project above. The two buildings will have up to 250 dwelling units and 40,000 square feet of retail floor space.

Applicant, Lot 31 Associates, is the developer selected by the County in a competitive solicitation for proposals to develop the subject property. The County entered into an agreement with Applicant to have Lot 31 Associates serve as the County’s agent for purpose of applying for and obtaining zoning and development approvals (Exhibit 4). The tax account numbers for the site are 07-00430190 and 07-00430361.

In addition to the subject rezoning application, this project is dependent upon¹ two other administrative processes, a “mandatory referral” to the Montgomery County Planning Board for approval of the proposed public parking garage (#06806-DPWT-1), and an “abandonment” of a portion of Woodmont Avenue (#AB 684), which will allow that thoroughfare to be realigned to accommodate the development. Technical Staff of the Maryland-National Capital Park and Planning Commission

¹ The term “dependent upon” is used in the sense that the project cannot be developed as contemplated unless these other administrative processes succeed; however, the instant rezoning application proceeds under an independent review process which is not specifically conditioned upon the completion of the mandatory referral and the abandonment.

(M-NCPPC) recommended that the Planning Board approve both the abandonment petition (Exhibit 48) and the mandatory referral (Exhibit 47).

The building planned for Lot 31 (*i.e.*, west of Woodmont) would be three to five stories tall, with retail space on the first floor and on two mezzanine levels above the first floor. The building planned for Lot 31A (*i.e.*, east of Woodmont) would be six to nine stories tall (up to 90 feet) and would also have retail space on the first floor and on two mezzanine levels above the first floor. The buildings would house 12.5% MPDUs, and up to 35 “workforce housing units.” Because this development called for a height above the 75 feet recommended in the Sector Plan for this CBD area, Zoning Ordinance §59-D-1.61(a) required review by an Alternative Review Committee (ARC) to determine whether the inclusion of MPDUs made the additional height necessary, for the project to be financially feasible. The ARC reviewed the matter, and on June 12, 2006, issued a finding that the additional height was needed to make the project financially feasible (Exhibit 46).

The application for rezoning was reviewed by the Technical Staff, and in a report dated June 7, 2006, Staff recommended approval of the application (Exhibit 43).² The Planning Board considered the application on June 22, 2006 and, by a vote of 5 to 0, also recommended approval, as stated in a memorandum dated June 23, 2006 (Exhibit 45). In that same memorandum, the Planning Board referenced the ARC recommendation, and observed that representatives of the County’s Department of Housing and Community Affairs (DHCA) and its Department of Public Works and Transportation (DPW&T) had testified in support of the project. The Planning Board also noted that it had approved the related abandonment and mandatory referral “as a separate item.”

A public hearing was noticed for June 27, 2006 (Exhibit 34), and it proceeded as scheduled. There was no opposition testimony at the hearing date; however, William Deyhle, a representative of the

² The Technical Staff Report is quoted and paraphrased frequently herein.

Ourisman Honda dealership which is adjacent to Parking Lot 30, testified to express the concern of that business that it be given adequate space to off-load its cars. Tr. 37-46. In addition, Martin Hutt, an attorney for the Seasons, LLC, which owns a building adjacent to Parking Lot 31A, appeared and represented that his client, which had opposed the project, had reached an agreement with the Applicant, reflected in the final binding elements, and it no longer opposed the development. Tr. 35-36.

The hearing in this case concluded on June 27, 2006, but the record was held open until July 5, 2006, to allow Applicant the opportunity to file some additional documentation (Exhibit 62). By letter dated July 12, 2006 (received on July 17, 2006), Douglas Firstenberg, a part owner of Applicant disclosed that he had personally made political contributions which he wanted to formally identify in the record. Exhibit 64. The Hearing Examiner reopened the record to receive this disclosure and left it open for another ten days, until July 28, 2006, to allow public comment. Exhibit 65. No additional comments were received, and the record closed again on July 28, 2006. The record was reopened for one day (September 6, 2006) to allow minor corrections on the Development Plan (Exhibit 66(a)).

The major issue in this case is not whether the site is appropriate for rezoning to TS-M (it clearly is), but whether the proposed development plan and related street realignment would produce an adverse impact on the flow of traffic. The Hearing Examiner finds that the proposed rezoning is consistent with law and in the public interest. The appropriate balance between vehicular traffic flow and pedestrian circulation will have to be determined by planners at site plan and subdivision.

III. FACTUAL BACKGROUND

A. Zoning History

The zoning history of Parking Lot 31 is set forth in the Technical Staff report (Exhibit 43, p. 6):

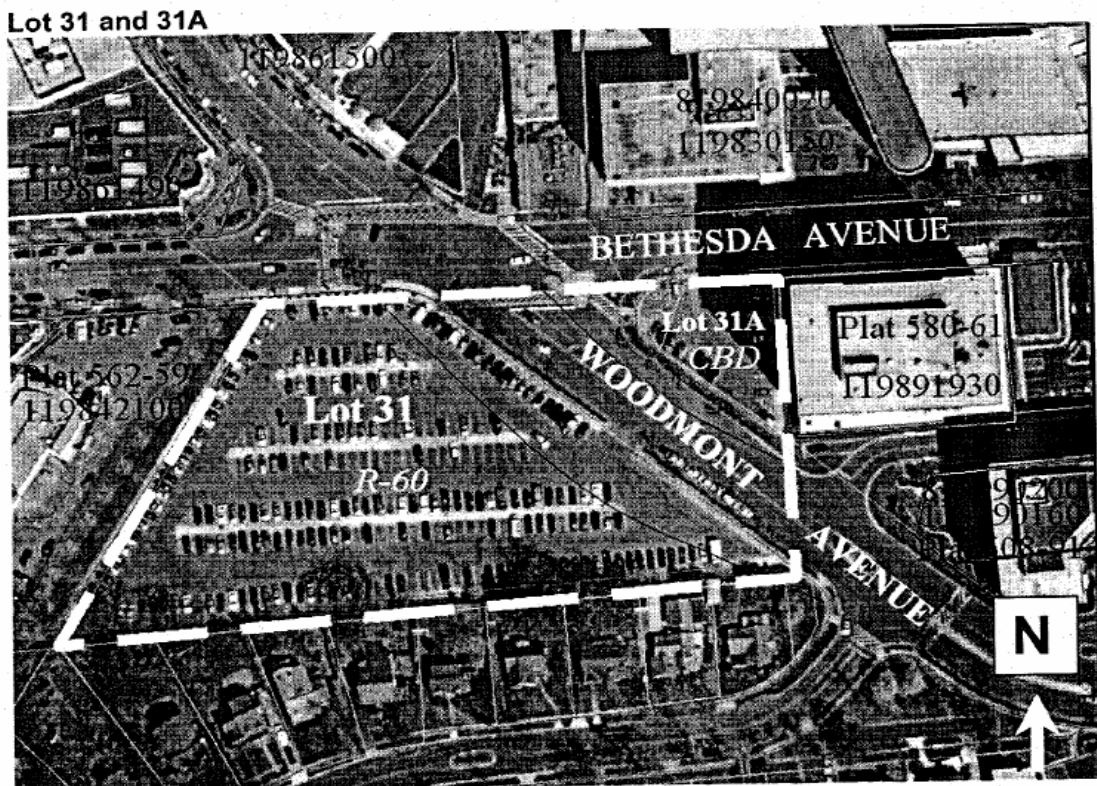
- a. 1954 Regional District Zoning; R-60 Zone enacted and mapped
- b. 1958 County-wide Comprehensive Zoning; R-60 Zone Confirmed
- c. SMA F-736: Adopted 08/15/72; R-60 Zone Confirmed
- d. SMA G-20: Adopted 12/06/77; R-60 Zone Confirmed

- e. SMA G-665: Adopted 06/26/90; R-60 Zone Confirmed
- f. SMA G-666: Adopted 06/26/90; R-60 Zone Confirmed
- g. SMA G-711: Adopted 10/11/94; R-60 Zone Confirmed

Parking Lot 31A's reclassification to the CBD-1 Zone dates back to SMA G-20 (12/06/77), and it was confirmed in SMA G-666 (06/26/90) and SMA G-711 (10/11/90).

B. Subject Property

The subject property, which straddles Woodmont Avenue, is comprised of two tracts currently being used as public parking lots (Parking Lots 31 and 31A), with 279 surface parking spaces, in the southern portion of downtown Bethesda. Parking Lot 31, which is west of Woodmont Avenue, is located adjacent to, and north of the Sacks Subdivision, with the Capital Crescent Trail to the west, Woodmont Avenue to the east and Bethesda Avenue to the north. It consists of recorded lots 138 and 139, and parts of lots 18, 19, 20, 21, 22, 23 and 24. Parking Lot 31A, which is east of Woodmont Avenue, is located adjacent to, and west of, the Seasons high-rise apartment building. It consists of parts of lots 18 and 19, and is bordered on the north by Bethesda Avenue and on the south and west by Woodmont Avenue. The site is shown below in an aerial photograph from the Technical Staff report:



The property is within the Bethesda CBD Sector Plan area of downtown Bethesda and is approximately 1,500 feet from the Bethesda Metro Station. The combined property is trapezoidal in shape, and the gross tract area, including dedicated public right-of-way, is approximately 3.3 acres (143,819 square feet). The net lot area (contemplating the abandonment of existing Woodmont Avenue right-of-way and re-establishment of the relocated Woodmont Avenue right-of-way by grant of easement) is approximately 3.07 acres (133,738 square feet).

According to Technical Staff, the topography is such that the site slopes in different directions to allow water to drain from the parking surface areas. Woodmont Avenue slopes gradually upward from the north to the south of the property. The property is zoned R-60 ((Residential, one-family) to the west of Woodmont Avenue, and CBD-1 (Central Business District-1) to the east of Woodmont Avenue. Applicant notes that the property is located within the Bethesda Parking Lot District (“PLD”), the Bethesda Transportation Management District (“TMD”), the Bethesda Urban District and the Bethesda Arts and Entertainment District. Exhibit 15. There are no historic structures or sites situated on the property, and according to Applicant’s engineering report (Exhibit 13), the site contains no wetlands, streams, stream valley buffers, hydrologically significant features or one-hundred year floodplains. Site soils are classified as Urban Land (400), which is considered suitable for development. Several trees are located on the southern edge of the property on either side of the boundary of the Sacks Subdivision, which is comprised of single-family detached dwellings.

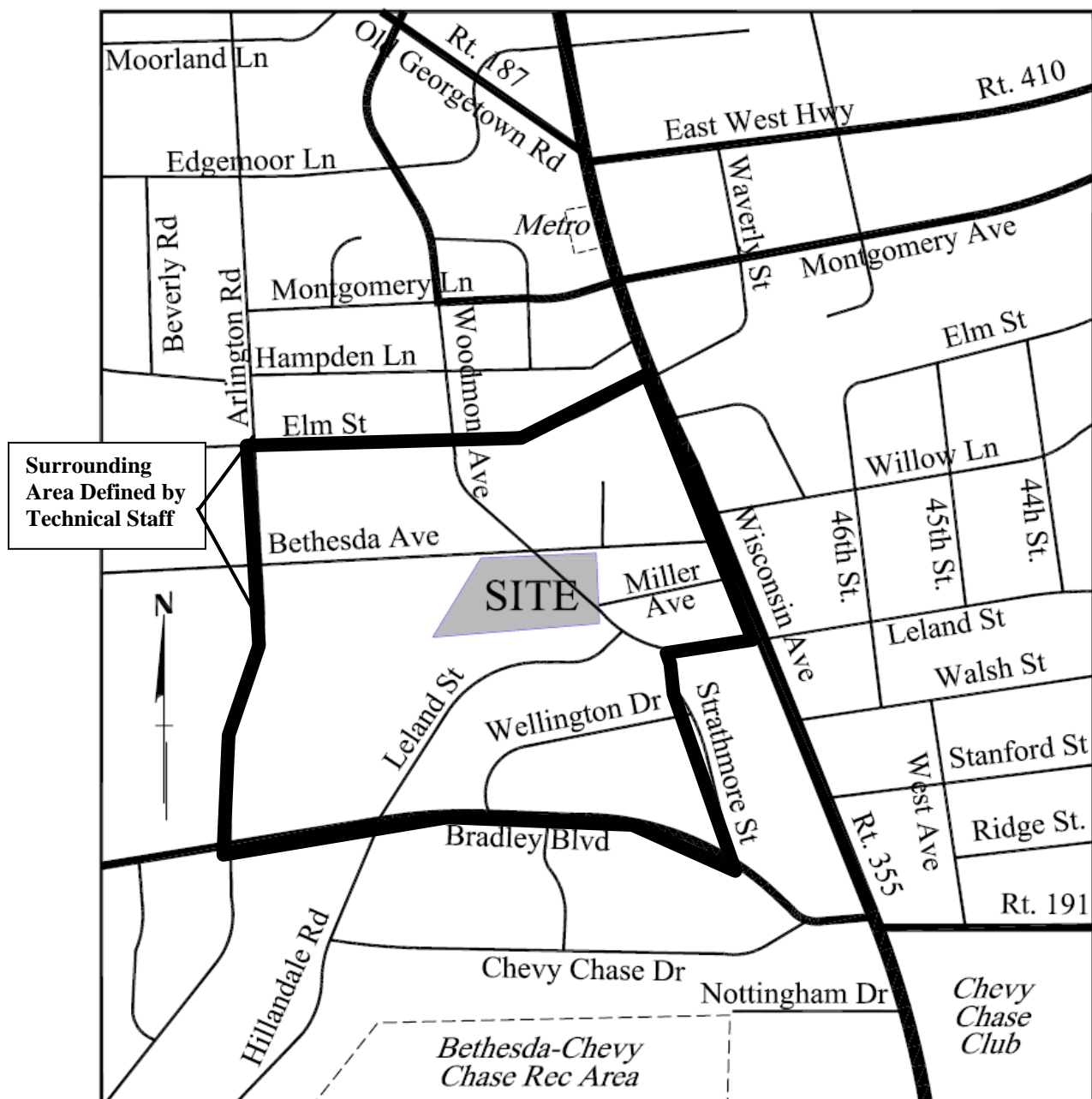
C. Surrounding Area And Adjacent Development

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed

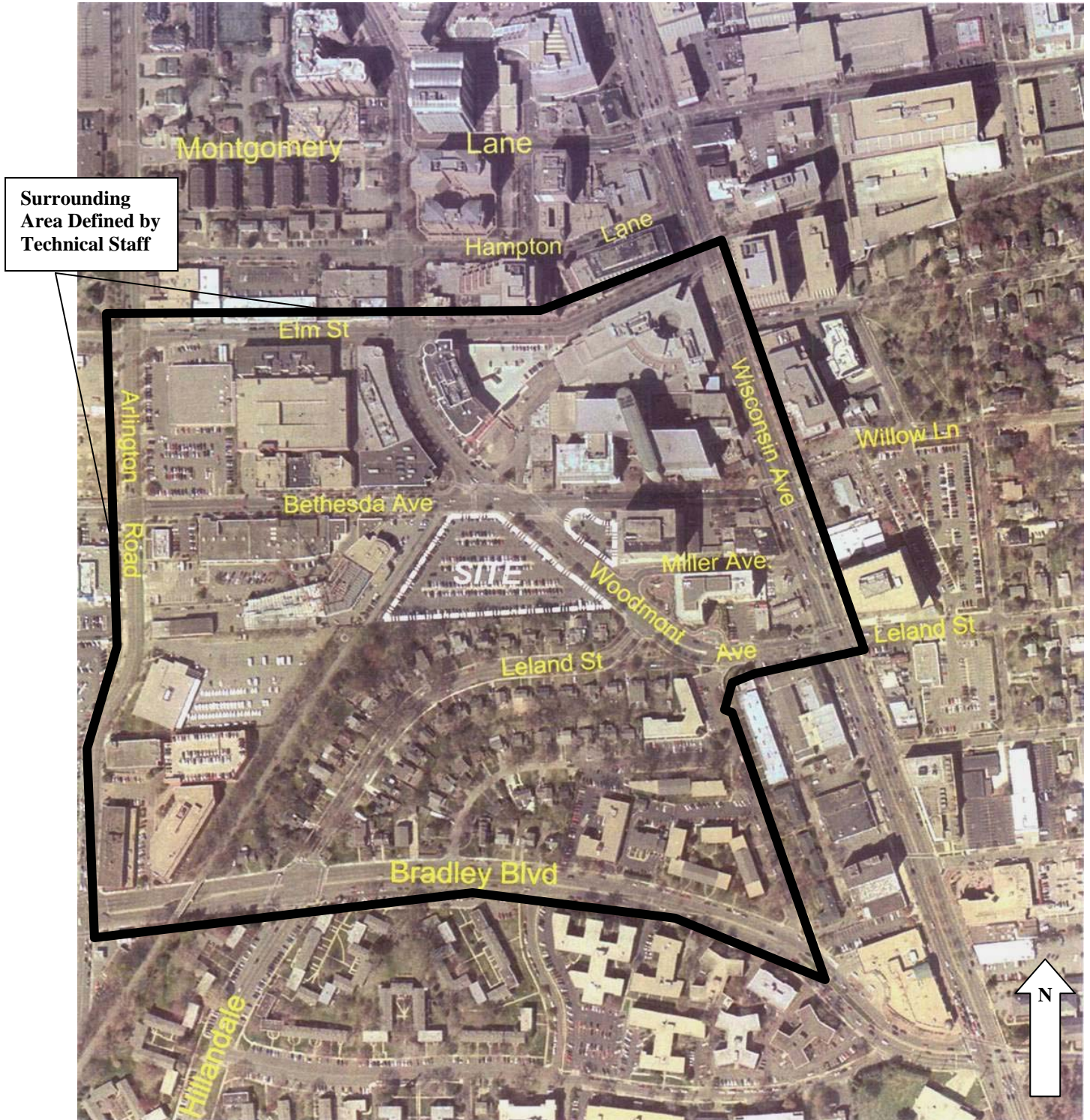
development. In the present case, Technical Staff recommends (*Technical Staff report, Exhibit 43, pp. 3*) designating the surrounding area as:

... located between Elm Street to the north, Arlington Road to the west, Bradley Boulevard, Strathmore Avenue, Woodmont Avenue, Leland Street and Wisconsin Avenue to the south and east, including properties on Miller Avenue.

The Surrounding Area, as defined by Technical Staff, is shown below in the Local Vicinity map appended as Attachment 1 to the Civil Engineering Report (Exhibit 13):



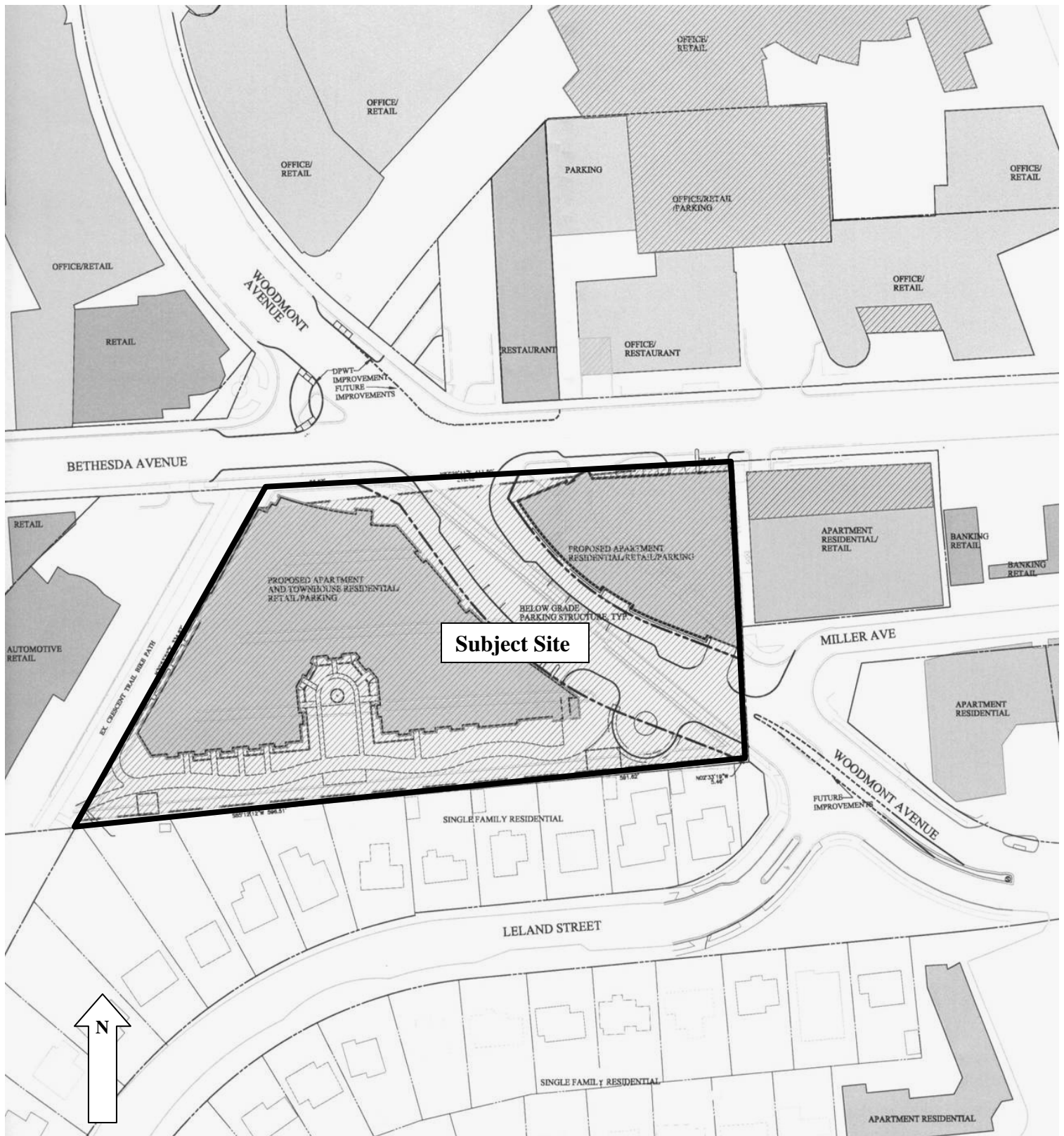
The “Surrounding Area” has also been outlined by the Hearing Examiner on the aerial photo labeled Figure 1-1 in the Local Area Transportation Review Traffic Study filed as Exhibit 38(g):



Although Applicant had defined a slightly different surrounding area in its initial filings, Applicant's land use expert, Douglas Wrenn, testified that Applicant accepted Technical Staff's definition of the surrounding area. Tr. 125. The Hearing Examiner also accepts this definition because it appropriately designates the area that will be most affected in terms of the compatibility of the proposed structures; however, a much greater area will likely be affected by the addition of the large underground public/private garage which is planned, in that it should help to alleviate parking problems for all businesses in the area. Similarly, any traffic flow reductions caused by changes in the intersection of Woodmont and Bethesda Avenues may well be felt in an area greater than the defined "Surrounding Area."

Land use in the surrounding area is mixed, and there are several zoning classifications, including C-2 and CBD-1. The Sacks Subdivision is located south of the subject property. It is comprised of single-family detached residential units in the R-60 Zone. A three-story automotive retail building (Ourisman Honda), on C-2 zoned land, is located to the west of the subject site, just across the Capital Crescent Trail. A three-story retail building, a one-story retail building and a restaurant in the C-2 Zone, as well as an 8-story office building with a restaurant in the CBD-1 Zone, are located to the north of the property, across Bethesda Avenue. A 15-story residential apartment and retail building (the "Seasons") is located to the east of the subject property. It is 143 feet tall and is set back 13 feet from the eastern property line. This building is closer to the proposed buildings than any others in the surrounding area. Other nearby land uses include high-rise residential buildings, townhouses, condominiums, and retail and office uses.

The surrounding uses in the immediate vicinity of the subject site can be seen on the following "Site and Surrounding Area Plan" filed as an Exhibit 21(a):



D. Proposed Development

1. Development Concept and Applicant's Vision for the Project

The Applicant seeks to reclassify the subject site to the TS-M Zone so that it can construct a mixed-use project, including two buildings with 332,000 square feet of residential space, to house 250 dwelling units, and 40,000 square feet of retail space on the ground floor and mezzanine levels. The dwelling units would include 12.5% moderately priced dwelling units (MPDUs) and up to 35 “workforce housing units” (WFDUs). Applicant’s vision of the two buildings is shown below in the following illustrative “perspective view,” looking south along Woodmont Avenue:



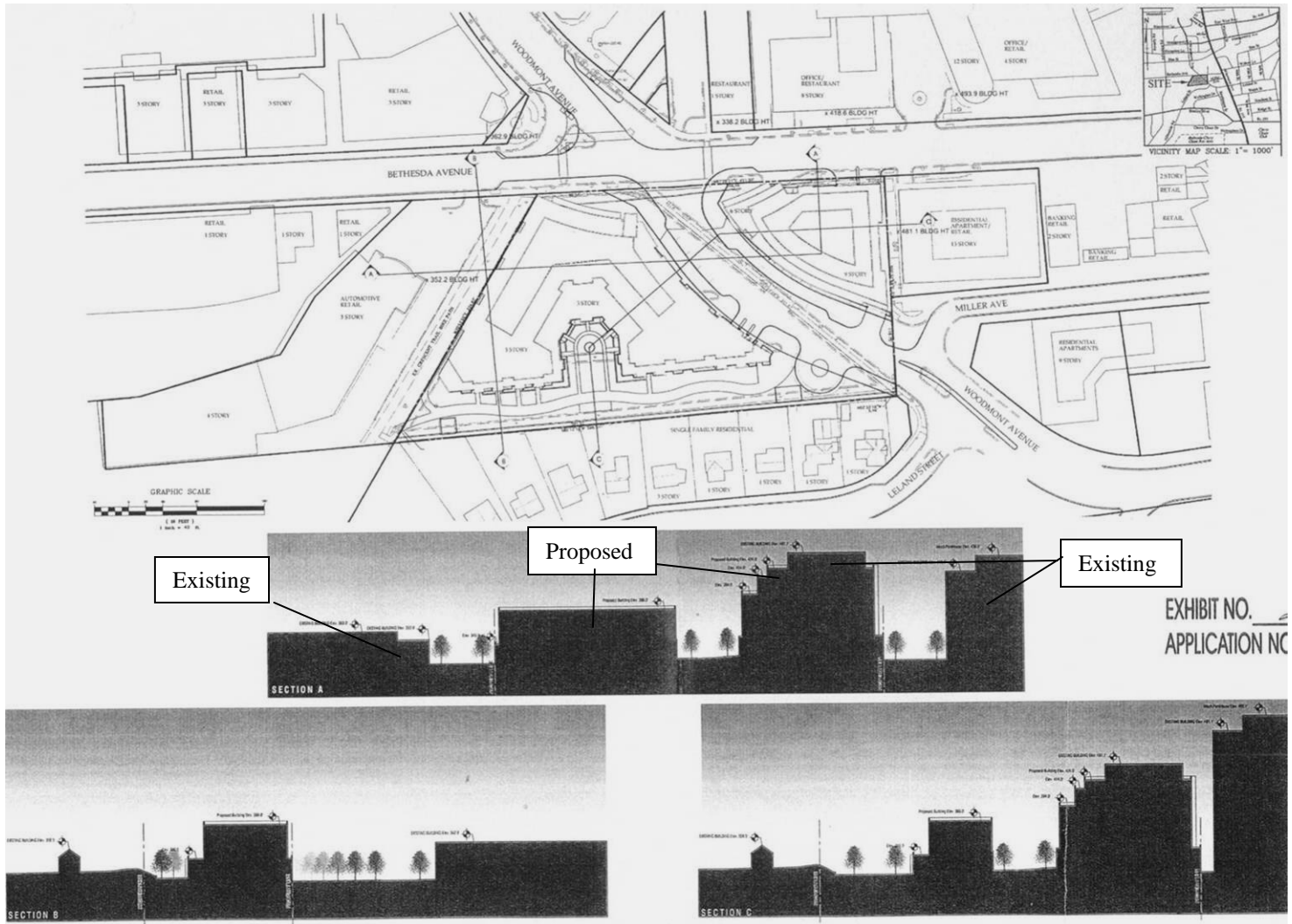
Beneath the two buildings and Woodmont avenue will be an underground garage to accommodate 1138 public spaces and 342 private spaces (for the residents of the proposed buildings). The project includes an abandonment of the current right-of-way (ROW) along Woodmont Avenue, and a realignment of Woodmont Avenue to allow construction of the proposed buildings and to

building is located along the west side of Woodmont Avenue. Retail space will be on the first floor of this building and in two mezzanine levels above the first floor. The retail space will be located along a portion of the Capital Crescent Trail with direct access to Bethesda Avenue and Woodmont Avenue. The main entrance lobby for the residential portion of this building will be located on Bethesda Avenue.

- **Residential Building Located East of Woodmont Avenue** - This building is located on the east side of Woodmont Avenue. It will range from six to nine stories tall (90 feet), stepping up from Woodmont Avenue to the east towards the existing adjacent 15-story residential building (the Seasons). The service area is located along Bethesda Avenue adjacent to the Seasons high-rise residential building. Retail space will also be on the first floor of this building and in two mezzanine levels above the first floor. The retail space will have direct access from Bethesda Avenue and Woodmont Avenue. The main entrance lobby for this residential building will also be located on Bethesda Avenue.
- **Public and Private Parking Garage** - Each building has access to the same underground, 342-space private parking garage associated with the private residential and retail space. The project also includes a 1,138-space public parking garage (County Parking Lot District). The combined public and private parking garage is located below grade under both buildings and Woodmont Avenue. Access to the combined garage is located along the east side of Woodmont Avenue and along Bethesda Avenue near the Seasons high-rise residential building.
- **Re-Alignment of Woodmont Avenue** - The Development Plan includes a re-alignment of Woodmont Avenue. This street will be closed during the construction of the below grade garage. Woodmont Avenue will be reconstructed with a small realignment.
- **Improvements to the Intersection of Woodmont Avenue and Bethesda Avenue** - The applicant proposes to neck-down two quadrants of the intersection of Bethesda. These proposed improvements coincide with current improvements by the Department of Public Works and Transportation (DPWT) to improve the intersection of Woodmont Avenue and Bethesda Avenue. These combined improvements are intended to improve pedestrian and bicycle safety, and circulation at the intersection of Woodmont Avenue and Bethesda Avenue. These improvements were recommended in the 1994 Bethesda CBD Sector Plan.
- **Streetscape, Public Use Space, and Active and Passive Recreation Space** - The applicant proposes street level retail and streetscape amenities to enhance the pedestrian experience along Bethesda Avenue and Woodmont Avenue.

The proposal is intended to be compatible with adjacent development and provide a transition from the Central Business District to the adjacent, single-family-detached neighborhood to the south.

The following “Site Section Exhibit” (Exhibit 26(a)) demonstrates the height compatibility of the proposed buildings:



The comparative heights of the buildings along Bethesda Avenue, looking South, can also be seen in the following “Conceptual Streetscape” (Exhibit 25, top drawing):



Applicant's vision for the proposed development is described in its Statement, Exhibit 15, pp. 4-5:

The Property forms an important gateway to the downtown Bethesda community based on its proximity to the heavily traveled [Crescent] Trail, which is located directly on the west side of the site. The Mixed-Use Project will not only accommodate the Trail users with convenient access and safer pedestrian connections, but it will also provide additional amenity areas intended to promote and enhance the pedestrian experience. . . . The Mixed-Use Project takes into account and compliments all of these neighboring properties and developments through incorporation of appropriate setbacks and transitions, animated streetscapes, varying building heights and massing, quality façade and other proposed architectural treatments, as well as safe and efficient pedestrian and vehicular connections.

Applicant summarizes the key elements of the Joint Development Project as (Exhibit 15, p. 6):

- 1) pedestrian, transportation and [Crescent] Trail improvements with "pedestrian first" objectives;
- 2) the creation of community identity and public use amenities,
- 3) retail enhancement and street activation,
- 4) urban mixed-income residential development, including MPDUs and WFDUs, and
- 5) the provision of an efficient public parking structure.

The realignment of Woodmont Avenue is, in Applicant's view, very important to the success of the Joint Development Project because it will create a more compatible development parcel on Lot 31A and will improve the pedestrian experience and safety. Also of critical importance to the success of the Mixed-Use Project is the inclusion and orientation of retail throughout the project. Applicant suggests that its retail plan will "activate" the Bethesda Avenue and Woodmont Avenue street fronts, drawing patrons toward the retailers and adding another element of attraction for retailers to become involved. In this connection, Applicant's plans to enhance Bethesda Row "by encouraging exploration and use of public facilities, contemporary multi-family condominium and townhouse-style condominium units, and desirable street-level retail along Bethesda Avenue and both sides of Woodmont Avenue." Applicant seeks not only to enhance what is successful about Bethesda Row, but also strives to "complete" this area as an "18 hour" environment by adding improved and safer pedestrian circulation,

critically needed retail diversity, mixed-income urban living opportunities, improved public amenities and expanded parking. Specifically, Bethesda Row would be improved by (Exhibit 15, p. 9-11):

- Providing street-level retail and streetscape;
- Adding public seating (in non-restaurant areas) for those strolling or biking and wanting to rest and “people watch;”
- Constructing a “bike depot” at the southern intersection of the Trail and Bethesda Avenue;
- Establishing an on-site vehicular drop-off for bicycle and pedestrian access to the Trail on the west side of Woodmont Avenue (relocated) away from the main intersection; and
- Activating links to the [Crescent] Trail not only with appealing landscape architecture but also with two-story townhouse-style condominium . . . lining the southern and western edges of the Property and fronting on the Trail connection from the drop-off area described above to the Trail. . . .

As will be discussed more fully below, the Hearing Examiner finds that Applicant’s development concept and vision for the project constitute a coherent and well-conceived plan for the development of Parking Lots 31 and 31A, in accordance with the standards set forth in the Zoning Ordinance and the objectives of the applicable master plan.

2. Development Plan & Binding Elements in LMA G-850

Pursuant to Code § 59-D-1.1, development in the TS-M Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-M Zone. Under Code §59-D-1.3, this development plan must contain several elements:

- (a) A natural resources inventory;
- (b) A surrounding area map, showing the relationship to the site and use of the adjacent land;
- (c) A land use plan showing site access; locations and uses of all buildings and structures; a preliminary classification of dwelling units; locations of parking areas, including number of parking spaces; location of land to be dedicated to public use; location of land intended for common or quasi-public use but not intended to be in public ownership; and a preliminary forest conservation plan;
- (d) A development program stating the sequence of proposed development;
- (e) The relationship, if any, to the County’s capital improvements program;
- (f)&(g) [Inapplicable to the TS-M Zone];
- (h) A diagram showing general build and height of principal buildings, their relationship to each other and adjacent areas; and

- (i) [Inapplicable because the property does not lie within a special protection area]

The Development Plan and the Land Use Plan that constitutes one of its primary parts are binding on the Applicant except where particular elements are identified as illustrative or conceptual. Illustrative elements may be changed during site plan review by the Planning Board, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

The land use plan for the present zoning application, Exhibit 66(a), is titled “Development Plan” and will be referred to by that name in this report. The binding elements are printed on the development plan, and they are as follows:

PROPOSED LOT 31/31A DEVELOPMENT PLAN (ZONING CASE G-850) – BINDING ELEMENTS

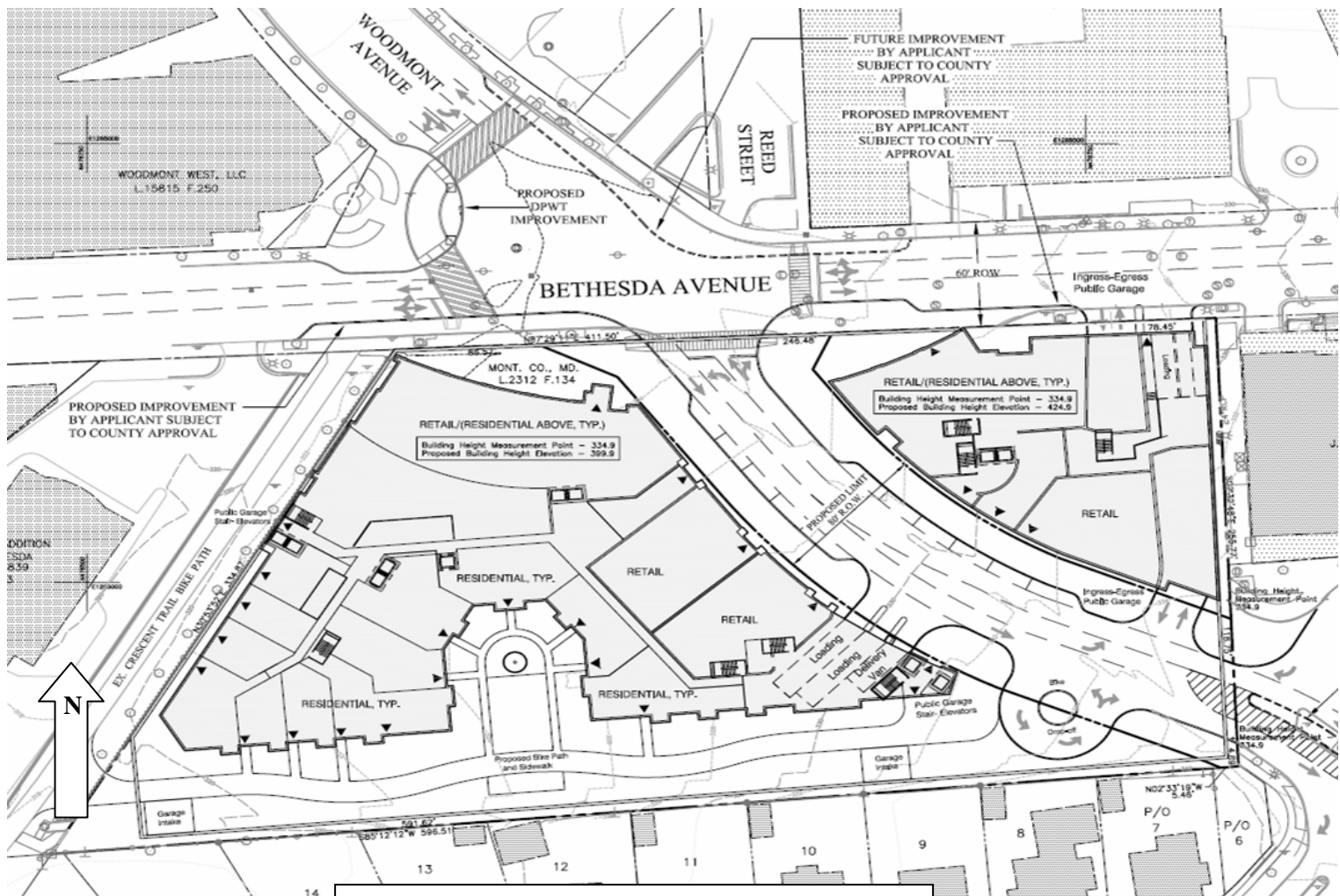
1. Maximum FAR Of 2.59 as reflected on development plan.
2. Maximum of 250 total dwelling units (final number of units and unit mix to be determined at site plan).
3. Maximum of 342 private parking spaces (total number of parking spaces based on unit mix to be determined at site plan).
4. Building setback from south property line, west of realigned Woodmont Avenue, to be 50 feet.
5. Building setback from east property line, east of realigned Woodmont Avenue, shall be 5 feet for the entire building line. Beginning at and above the second floor the building shall be setback from the east property line as shown on the plan entitled “Building Setback Plan At and Above Second Floor Adjacent to Seasons Building” entered into the public hearing record for this zoning application as Exhibit No 56 and which plan is also shown on the face of the development plan.
6. The mechanical penthouse on the rooftop of the building located east of Woodmont Avenue will:
 - (1) be setback 40 feet from the shared property line with the adjacent Seasons Apartments to the east (“Seasons”);
 - (2) not have any primary vertical components of any cooling towers located closer than 75 feet from the shared property line with the Seasons (by example, pipes along the rooftop that are ancillary to a cooling tower would be allowed); and
 - (3) have a maximum height of 14 feet above the roofline.
7. Measured from the measuring points shown on the development plan (identified on development plan as elevation 334.9 feet above sea level – the “Measuring Points”), maximum building heights (not including mechanical penthouse) are as follows:

- East of Woodmont Avenue: Building height not to exceed 90 feet as measured from the Measuring Points (elevation 424.9 feet above sea level), with step down to building height not to exceed 65 feet as measured from the Measuring Points (elevation 399.9 feet above sea level) at intersection of Bethesda Avenue and Woodmont Avenue.
 - West of Woodmont Avenue: Building height not to exceed 54 feet as measured from the Measuring Points (elevation 388 feet above sea level) for building west of Woodmont Avenue, with maximum building height of 14 feet as measured from the Measuring Points (elevation 348 feet above sea level) between 50 and 60 feet setback along southern property line (for town home style condominium units adjacent to single family Sack's neighborhood to south).
8. Provision on-site of 12.5% MPDUs per County law and provision of up to 35 workforce housing units per DHCA Agreement, to be finally reflected at site plan.
 9. Minimum 35% open space (active and passive recreational space/public use space), with final area to be determined at site plan.
 10. Developer to construct realignment of Woodmont Avenue and improvements to Woodmont Avenue/Bethesda Avenue intersection per the Development Plan and future DPWT approvals, with final design and operation of the intersection for pedestrians, bicyclists and vehicles to be determined at site plan.
 11. Loading docks serving buildings shall be enclosed within building area.
 12. All residential units will be multi-family condominium units.
 13. Dwelling units along the southern building edge of the building west of realigned Woodmont Avenue shall be townhome style condominium units.
 14. The underground public garage shall exhaust through the roof of the on-site buildings west of Woodmont Avenue (and away from adjacent residential uses), this also being known as the existing Lot 31 property, and there shall be no exhaust from the underground public garage through any buildings (through the roof or otherwise) east of Woodmont Avenue, this also being known as the existing Lot 31A property.
 15. A bicycle and pedestrian connection from Woodmont Avenue to the Capital Crescent Trail shall be provided along the southern property line within the 50-foot setback area, and the final design and operations of the bike drop off area adjacent to Woodmont Avenue to be finalized with DPWT and M-NCPPC at site plan.
 16. At time of site plan review, Applicant to provide appropriate hardscape/landscape in setback area along eastern property line. With the cooperation and authorization of the adjacent property owner to the east, coordinated hardscape/landscape amenities within the setback area located on the adjacent property to the east will be included as part of the amenity package for the redevelopment of Lot 31/31A by the Applicant.
 17. Detailed information regarding the ultimate location, operation, and alignment of Woodmont Avenue between Bethesda Avenue and Leland Street shall be provided for

DPWT and M-NCPPC review and approval at time of preliminary plan and site plan. New right-of-way for realigned Woodmont Avenue shall be established with DPWT at the time of preliminary plan and reflected on the record plat.

18. LATR study for the subject project to be provided by Applicant at time of preliminary plan reflecting approved public garage access points. The Applicant will further analyze capacity, design and operations of local road network.
19. The Applicant will request DPWT approval of a right-in/right-out limitation on ingress and egress to the public garage access along Bethesda Avenue.
20. Documentation of agreement between Applicant and DPWT allowing for private access beneath Woodmont Avenue to be provided at time of site plan, including documentation of future ownership of the public and private property.

A copy of the Development Plan (Exhibit 66(a)) is reproduced on the following pages. In order to make its details more visible, the site layout diagram is reproduced separately below. It shows the proposed locations of all structures, as well as additional information regarding the planned development.



Development Plan, Exhibit 66(a), Site Layout

In addition to the site layout diagram and the binding elements, the development plan contains the following “General Notes” and two tables, one showing the ROW to be abandoned, and the other showing Zone’s development standards and Applicant’s compliance:

General Notes:

1. The site is comprised of parts of recorded lots 18, 19, 20, 21, 22, 23, 24, and Lots 138 and 139 as shown on a plat recorded in Plat Book B, Plat 37, found on Montgomery County 23rd Edition Tax Map HN122, and rights of way provided from those lots. The tax account numbers are 07-00430190 and 07-00430361.
2. The present zoning is R-60 and CBD-1, found on Zoning Map 209NW05. Proposed zoning is TS-M.
3. Total Gross Tract Area = 3.30 acres or 143,819 square feet. Net Lot Area = 3.07 acres or 133,738 square feet.
4. The site is located within Bethesda/Chevy Chase Planning Area 35.
5. Boundary Information shown hereon were established by a topography and boundary survey by Rodgers Consulting, Inc., November 2005. Off-site topographic and building feature information is aerial topography provided digitally by MNCP&PC.
6. The site is within the Rock Creek basin.
7. Soils information was taken from the Soil Survey of Montgomery County, Maryland issued July, 1995, Sheet 27. The site is comprised of an urban land (400).
8. This property is the subject of an approved NRI/FSD (M-NCPPC #4-06089 Bethesda Lot 31)
9. No wetlands, 100-year floodplain, streams, stream valley buffers or other hydrologically significant features were observed or identified for the subject site.
10. Per the 1994 Bethesda CBD Sector Plan, no historical or cultural features were noted.
11. The property is to be served by public water & sewer systems. This property is presently classified in water and sewer category W-1, S-1 found on WSSC 209NW05.
12. The Horizontal Datum: NAD 83/91.
13. Site utilities are serviced by Comcast, Pepco, Verizon, Washington Gas and WSSC.
14. Mail facilities are located within the building.
15. Trash facilities are located within the building.
16. Stormwater quality facilities are located on-site within the structure parking garage.
17. Erosion and sediment control measures will be provided through perimeter controls and inlet protection.
18. This project is to be developed in one phase.
19. Land intended for public use but to remain in private ownership will be maintained in perpetuity for public use pursuant to agreement with the County. See Public Use Space and Amenities Plan for exhibit.
20. The public garage facility (including means of ingress/egress) is not part of this Development Plan and will be reviewed separately through the Mandatory Referral process.
21. Public utility easements and rights of way will be provided where needed on site and locations will be determined at permit.
22. Final determination of sidewalks and road lane widths to be determined by DPWT and Park and Planning.
23. All architectural renderings, elevations and perspectives shown as part of the development plan are conceptual and have been included for illustrative purposes only.

TABLE 2: WOODMONT AVENUE TABLE TO BE FINALIZED AT SUBDIVISION:

Existing ROW in Woodmont to be abandoned	0.628 Acres, 27,372sf
Proposed (estimated) reconfigured ROW in Woodmont	0.65 Acres, 28,312 sf

TABLE 1: DEVELOPMENT TABLE:

Using the 59-C-8.4- Development Standards, TS-M Zone

Standard	Required pursuant to Zoning Ordinance	Proposed for Approval
Lot Area	40,000sf Minimum	3.07 Acres, 133,738sf Net Lot 3.30 Acres, 143,819sf Gross Tract Area
Maximum building height	-- --	Maximum 90' East of Woodmont Avenue Maximum 65' West of Woodmont Avenue (See 'Building Height Measurement Point' on plan)
Floor Area Ratio*	3 FAR, Gross Tract (431,457sf)	2.59 FAR (372,500sf) Maximum
Development Summary** ^A Estimated Residential Units Affordable Housing Retail		250 Units total, Maximum Provision on-site of 12.5% MPDU's per county law and provision of up to 35 workforce housing units (per DHCA agreement) to be finalized at site plan 40,000 sf
Public Use Space Active and Passive Recreational Requirements**	10% of Net Lot (13,374sf) Minimum 25% of Net Lot for more than 50 dwellings units (33,435sf) Minimum	36.2% (48,489sf)
Total Open Space/Active and Passive Recreational Public Use Space requirements	35% Minimum	Final area to be determined at Site Plan but not less than 35%
Parking**** ^A Public Parking Spaces Private Parking Spaces		1138 Spaces*** 342 Spaces, maximum

* NOTE: For purposes of FAR calculations for this project, parking, parking aisles and loading areas are not included in FAR calculation.

** NOTE: Retail configurations/residential lobby/unit layouts are illustrative only and subject to modification and will be established at Site Plan.

*** NOTE: Public parking spaces are not part of this Development Plan and will be reviewed through mandatory referral (including number of spaces).

****NOTE: Property is located in the Bethesda Parking Lot District. Property is located within 1200 feet of the metro station.

^A NOTE: Total number of units and final unit count mix and number of parking spaces to be determined at site plan

The 3.30-acre gross-tract area includes 10,081 square feet of previously dedicated land for the right of way of Bethesda Avenue (approximately 0.23 acres). As shown on the Development Plan, the total floor area ratio will be 2.59, based on the 3.30-acre gross tract area. The project will be developed in one phase.

Technical Staff notes that the proposed development meets the requirement for public use space, and active and passive recreation space. The public use space includes public areas adjacent to the right-of-way, seating areas, and a “bike depot” located at the southern intersection of Capital Crescent Trail and Bethesda Avenue.³ In addition, an on-site drop-off for bicycles and a bike path with

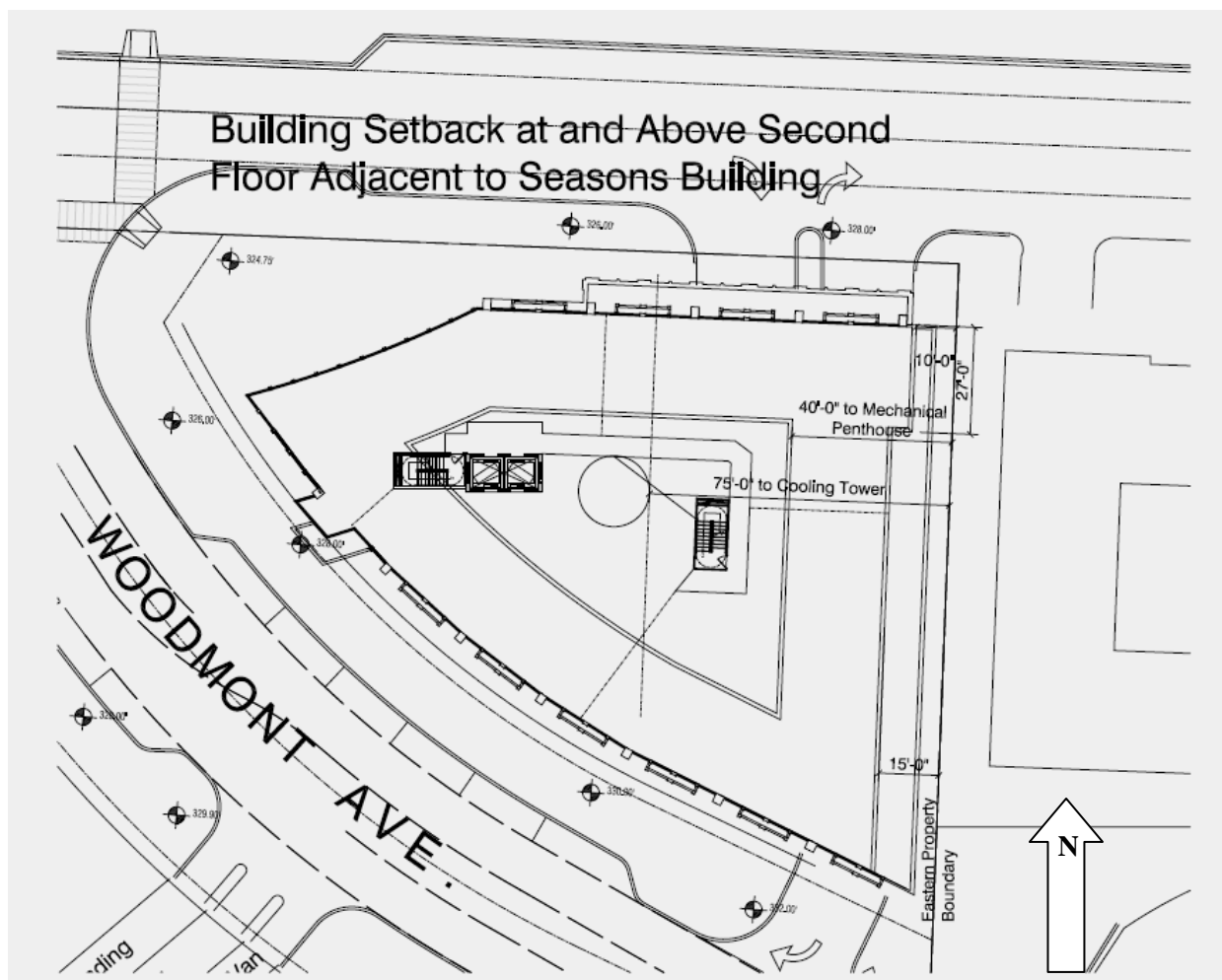
³ The “bike depot” does not appear on Applicant’s plans yet because it is being discussed with the community. Tr. 165-166.

a sidewalk will provide access to the Capital Crescent Trail from Woodmont Avenue. Active and passive recreation areas are located along Woodmont and Bethesda Avenues, and within the 50-foot setback area along the southern property line, adjacent to the single-family detached neighborhood, as shown below in the diagram from Exhibit 23. Open space is shown in green (*i.e.*, darker shade in the hard copy):



The only community concerns with regard to the proposed development plan were provided by two adjacent land-owners, the Landows, who own the “Seasons” building immediately to the east of

Lot 31A, and Ourisman's Honda, which is located immediately to the west of the Capital Crescent Trail. Their issues will be discussed in Part III.E. of this report; however, it should be mentioned at this juncture, that, prior to the hearing, Applicant worked out an agreement with the Landows, which is reflected in Binding Elements 5 and 6, and in the Development Plan (Exhibit 66(a)) as a diagram showing the new setbacks for the proposed Lot 31A building. That diagram is reproduced below, and is also contained in Exhibit 56:



The new setbacks for the Lot 31A building are 5 feet for the entire building at ground level, and beginning on the second floor and above, expand on the eastern side (*i.e.* adjacent to the Seasons building) to 10 feet for a distance of 27 feet along the eastern property line, and then to 15 feet for the

remainder of the eastern property line. In addition, restrictions were put on the height and location of the equipment penthouse planned for the building, and the proposed loading dock was reduced in size. Martin Hutt, an attorney for the Landows, appeared at the hearing and indicated that, given this modification to Applicant's plans, the Landows no longer objected to the proposed development. Tr. 35-36.

3. The Proposed Garage

The proposed public/private garage and the conversion to private use of Public Parking Lots 31 and 31A were reviewed separately as a "mandatory referral" to the Planning Board, pursuant to Article 28, §7-112 of the Maryland Code, which requires such a review of any changes in public facilities and structures. Therefore, Applicant contends that, "all attributes of the Public Parking Garage (e.g., number of spaces, organization of the garage structure's mechanical, ventilation, electrical, and similar components, points of ingress and egress, etc.) are outside of the scope of this application and Development Plan" Exhibit 15, p. 3. The Hearing Examiner does not completely agree with that portion of Applicant's statement since the planned garage will have both public and private spaces and since its construction is inextricably interwoven with Applicant's planned construction of two privately owned buildings on the surface above the future garage. Applicant clearly recognized these factors in adding this qualifier to its above-quoted statement "– nevertheless, the Public Parking Garage is reflected in the Development Plan as a fixed design element for context and to all[ow] for the orderly processing of the Mixed-Use Project through the TS-M zoning process."

The Hearing Examiner will therefore briefly outline the plans for the garage, the details of which will be reviewed by the Planning Board at subsequent proceedings. Evidence about the garage was presented at the hearing by Applicant, whose attorney introduced copies of the Mandatory Referral Application (Exhibit 53), and by William Frederick (Rick) Siebert III, Chief of the Parking Operations Section, Division of Operations, Department of Public Works and Transportation. Tr. 47-62.

Mr. Siebert testified that the Planning Board “unanimously supported” the mandatory referral application. Tr. 60. The Hearing Examiner takes official notice of the June 28, 2006, letter from the Chairman of the Planning Board to the Director of DPW&T, stating that the Planning Board had reviewed the mandatory referral of June 22, 2006, and that it found “the disposition of public property at Lot 31 and Lot 31-A and the location and use of the proposed joint public-private mixed-use redevelopment project⁴ [to be] appropriate.” The letter also passed along other comments by Technical Staff,⁵ calling for continued review of the details of the proposed garage, continued analysis of the ultimate location, operation and alignment of the to-be-relocated Woodmont Avenue, and continued communications with all concerned parties regarding the proposed design and operation of the roadways fronting on Lots 31 and 31A.

Mr. Siebert asserted that the County has had a longstanding need for a public parking garage at this site because there is a “deficit of public parking” in the area, which he displayed in a chart:

Mandatory Referral – DPWT Parking Demand Study

	<u>No. of Spaces</u>
2003 DPWT Update of South Bethesda Parking Deficit	290
Federal Realty Investment Trust – Arlington East	180
Replace Public Parking Lots 31 and 31A	279
Lot 31 Redevelopment - Retail Component	150
Bethesda Row Expansion – Southside Bethesda Avenue (Potential)	286
<u>Read Street Project (Potential)</u>	<u>164</u>
TOTAL Projected Demand	1,349

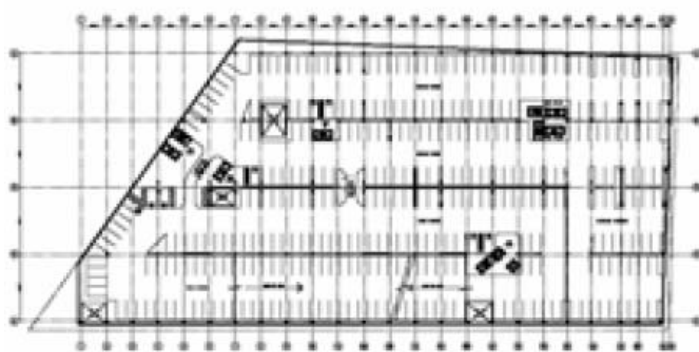
⁴ The public-private joint development includes the public/private parking garage, the realignment of Woodmont Avenue and the private mixed-use project.

⁵ Technical Staff’s analysis regarding the mandatory referral is in the record as Exhibit 47.

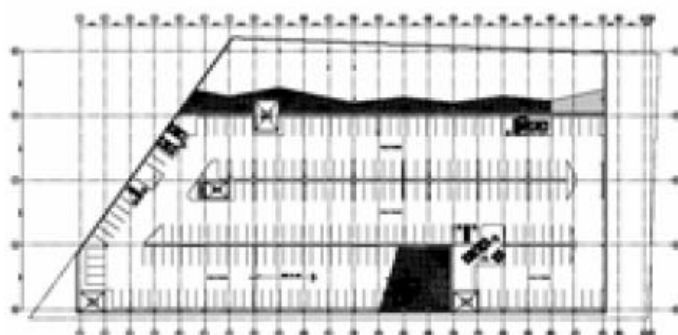
Mr. Siebert also mentioned that the public/private joint development of parking lots 31 and 31A will achieve public policy objectives by providing workforce and affordable housing where it is sorely needed. He characterized the project as “smart growth,” given its proximity to the Bethesda Metro station. Mr. Siebert indicated that the County has engaged in an extended community outreach concerning a potential project at this site for many years and that community considerations were incorporated into every stage of this development effort, including during the design process of the public parking garage. In his opinion, this public-private joint development meets the objectives identified above.

According to Mr. Siebert, the planned garage will be a four and a half level underground structure, stretching under the entire 3.3 acre subject site (*i.e.* under Lot 31, Woodmont Avenue and Lot 31A). It will have a total of 1480 spaces, 1138 public and 342 private. Below is a diagram showing the garage layout, from Mr. Siebert’s PowerPoint presentation (Exhibit 58):

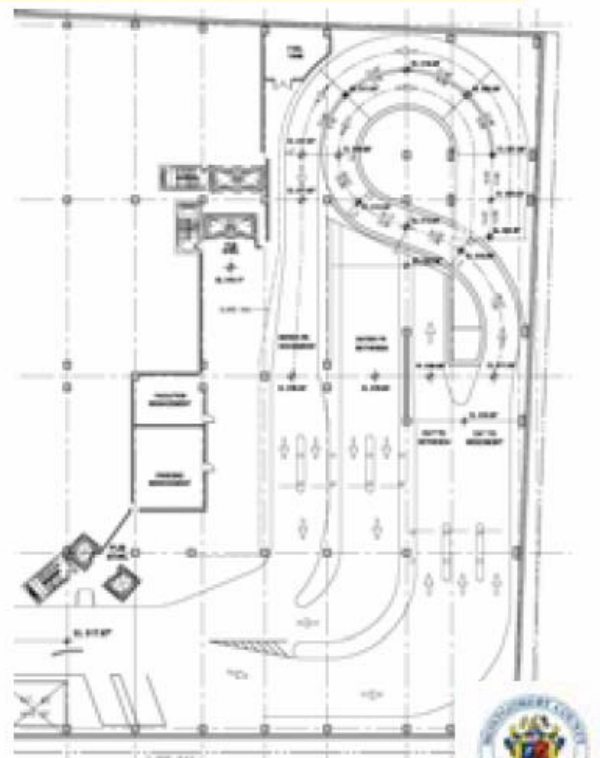
Garage Layout



Typical Parking Level



Garage Level G5

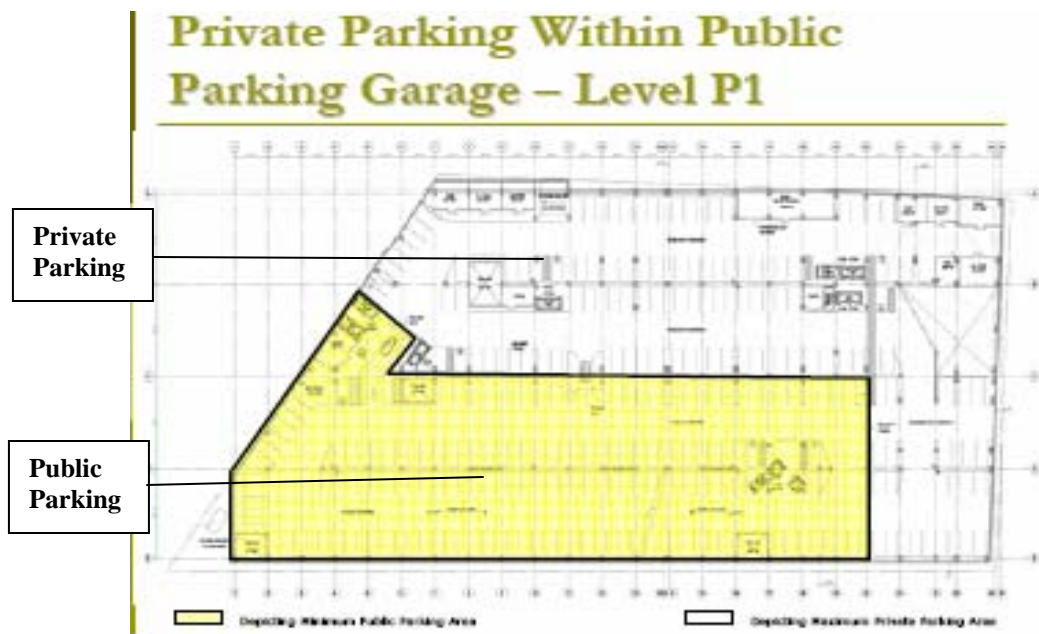


Garage Entry/Exit Ramp



Pedestrian access to and from the garage is provided at three separate locations. This makes it easy to access the retail space, the Capital Crescent Trail, and Woodmont and Bethesda Avenues, for those walking to these nearby areas. The design provides a single point of revenue control, which simplifies “way-finding,” lowers costs and creates space efficiency, according to Mr. Siebert. The single point of revenue control is located a considerable distance from the street entrances and exits, in order to provide long internal vehicle stacking areas and to eliminate on-street stacking. The ramping system, in conjunction with the single revenue control point, makes it much easier for drivers to choose their exit lanes based on their destinations.

There are private elevator and stairwell areas that go directly to the private areas of the garage, and there are three public stairwells and elevator areas that access the public parts of the garage. Vehicular access to the garage will be from both Bethesda and Woodmont Avenues, and it will be shared by the public and private users. Private parking users will be permitted by the County to utilize the public ramps, points of ingress, egress and other public features of the garage. They will share the entrance and exit system, and they will share the common single control point. The private parking will be “nested” on three floors of the garage, along Bethesda Avenue. The following diagram from Mr. Siebert’s PowerPoint presentation shows the division between the public and private parking on Level 1:



Construction of the garage will take 18 to 24 months, “once the shovel goes in the ground.” Its actual usage may be delayed beyond that because the designers made a decision to exhaust the ventilation system through the roof of the Lot 31 building to avoid any adverse impact on the adjoining neighborhood and pedestrians in the area.

The garage is clearly a “work-in-progress,” but it is evident to the Hearing Examiner that a great deal of thought and planning has gone into the design of the structure, and the addition of the planned parking spaces is clearly in the public interest.

4. Right-of-Way Abandonment and Realignment of Woodmont Avenue

The Council reviewed the Abandonment Petition on August 1, 2006. The Hearing Examiner takes official notice of Council Resolution 15-1584, conditionally approving the abandonment. The first part of this Resolution reviewed conditions recommended by the Department of Public Works and Transportation and by the Planning Board:

8. The Department of Public Works and Transportation conditioned approval upon the applicant dedicating and constructing, at its expense and to County standards, the new replacement right-of-way at a location approved and in a manner approved by the Department for that portion of Woodmont Avenue covered by the abandonment petition, granting any necessary easements for County storm drains and public utility facilities within the replacement right-of-way, and at applicant’s expense relocating any of these facilities and granting easements for the relocated utilities; the applicant must record a new record plat incorporating the former right-of way; and the applicant must dedicate to public use new Woodmont Avenue and provide acceptable security for completion of the new relocated Woodmont Avenue prior to this abandonment becoming effective.

9. The Montgomery County Planning Board of Maryland-National Capital Park and Planning Commission (M-NCPPC) recommended approval conditioned upon the applicant dedicating new right-of-way for relocated Woodmont Avenue, the precise area of which will be determined by the Planning Board as a condition of a future preliminary plan for the proposed redevelopment of County parking lots 31 and 31 A and will include:

- a. A minimum 80 feet of right-of-way across the property to accommodate the relocation of Woodmont Avenue on a new alignment between Bethesda Avenue and Leland Street; and

b. Sufficient width to accommodate necessary improvements at the intersections with Bethesda Avenue and with Leland Street, as defined by the Planning Board as a condition of preliminary plan approval.

Council Resolution 15-1584 approved the abandonment, with the following conditions:

1. The Applicant shall record all necessary easements and if necessary relocate facilities for any affected public utility companies and Montgomery County for storm drainage facilities in place, as well as proposed facilities, for purposes of repair and maintenance.
2. The Applicant shall bear all costs for the preparation and recordation of all necessary easement documents and plats
3. The abandonment is conditioned upon:
 - a. Approval by the County of fully engineered drawings for the construction of relocated Woodmont Avenue;
 - b. Provision by the applicant of sufficient and appropriate guarantees through performance bond, Letter of credit or other surety acceptable to the County guaranteeing the completion of construction of relocated Woodmont Avenue (With related structural support, streetscape and other improvements within the public right-of-way);
 - c. Approval by the Montgomery County Planning Board of a preliminary plan of subdivision for the properties (including the existing right-of-way being abandoned and the relocation of Woodmont Avenue);
 - d. Recordation among the Land Records of Montgomery County, Maryland, of a volumetric public right-of-way easement creating an 80 foot wide public right-of-way cube' for relocated Woodmont Avenue at a depth acceptable to the County;
 - e. Recordation of a subdivision plat creating the properties as a single lot of record subject to the easement creating the relocated Woodmont Avenue right-of-way and incorporating the abandonment of the existing Woodmont Avenue right-of-way;
 - f. Development of a plan by the Department of Public Works and Transportation for detouring traffic during the period that Woodmont Avenue will be closed to traffic, including the provision of clear and ample signage for detour routes; and
 - g. Development of a plan by the Department of Public Works and Transportation to notify area residents and businesses near the intersection of Woodmont and Bethesda Avenues of the details of Woodmont Avenue's reconstruction, including the schedule for the temporary road closing, and accommodations to pedestrians, bikers, and parkers during this reconstruction.

* * *

Council Conditions 3.f and g. reflect the Council's concern about the impact of the two-year closure of Woodmont Avenue upon the residents, workers and visitors to that area of Bethesda.

Nevertheless, the Council's decision of approval amounts to a determination that, on balance, the public interest will be served by the temporary dislocations needed to ultimately provide more parking and better pedestrian access to the area, as well as more affordable housing and more retail space. This question had troubled the Hearing Examiner because closure of Woodmont Avenue for two years, in addition to the temporary reduction in parking spaces from the closure of Lots 31 and 31A, certainly will result in a great deal of inconvenience in the short run. This kind of question, temporary inconvenience from construction, is not ordinarily addressed in zoning reviews, and the Hearing Examiner will not explore the issue further given the Council's determination in authorizing the abandonment.

The proposed roadway improvements at the intersection of Bethesda and Woodmont Avenues include both reconfiguration of the northwest corner of the intersection to remove the separate southbound to westbound right-turn lane, and narrowing of Bethesda Avenue to a single travel lane for each approach to Woodmont. As to these plans, Mr. Siebert of DPW&T testified (Tr. 50-51):

The realignment of Woodmont Avenue is a key component of the county's ability to achieve all the public policy objectives of the RFP.

First, and significantly, the alignment of Woodmont improves pedestrian safety at an intersection that has been identified as problematic. It squares off an intersection that is currently offset with unusually wide pedestrian crossings. The realignment dramatically reduces the pedestrian crossing distances, resulting in substantially safer pedestrian experience.

Second and equally important, the realignment of Woodmont allows a garage design that locates vehicular access as far as possible from the intersection of Woodmont and Bethesda Avenues. This minimizes vehicular conflicts and makes for a more efficient intersection.

Third, [it] allows for a very efficient garage design, which internally minimizes vehicular and pedestrian conflicts, maximizes parking spaces and saves costs. . . .

It lastly optimizes the development potential of Lots 31 and 31A taken as a whole.

Both Transportation Planning Staff and Applicant's Transportation Planner, Martin J. Wells, examined, and continue to examine, the combined impact of the proposed realignment of Woodmont Avenue and the addition of the large underground garage and the mixed use buildings on Lots 31 and

31A. In fact, their analysis thus far has gone well beyond what is usually done in a Local Area Transportation Review (LATR). Ordinarily, LATR measures anticipated critical lane volumes (CLV) at impacted intersections to determine whether these volumes will be within County standards. In the subject case, in addition to the CLV analyses of both the mixed use project and the proposed garage, Mr. Wells did a “Synchro/Sim” traffic operations analysis (Exhibit 38(g), pp. 61-66), which he described, as follows, in his testimony (Tr. 203):

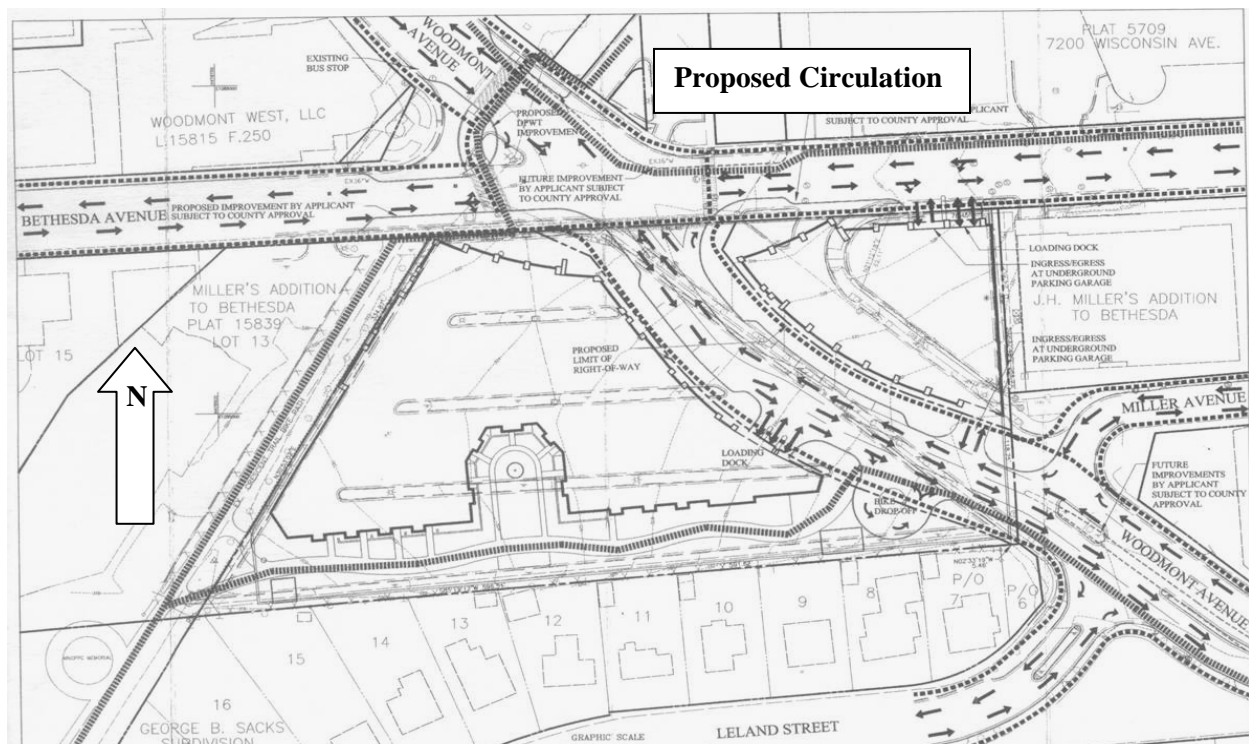
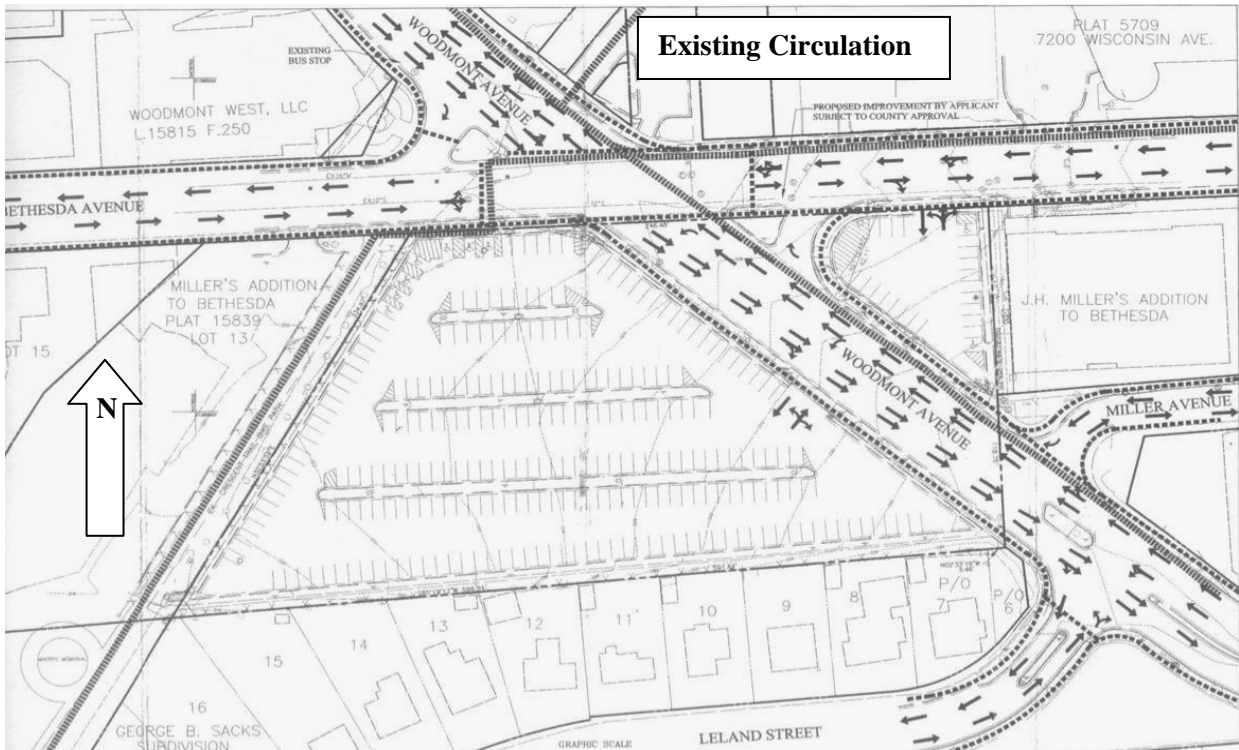
This is a technique that models the flow of individual vehicles through a transportation network. It is a delay based methodology. Again, not typically mandated by the planning board. It takes into account specific traffic signal cycling, phasing, timing, coordination amongst the various signals.

It looks at queuing.⁶ It looks at how queues form and dissipate as the traffic signals turn from green to yellow, red and back to green again. And if it a queue would back up into an upstream intersection, the affects of those backups is reflected in the model. It includes pedestrian activity. It take into explicit account the percentage of trucks and other heavy vehicles. It takes into account a lot of factors that the critical lane volume technique does not take into account.

This analysis examined the impact upon vehicular and pedestrian traffic at seven intersections in the vicinity of the proposed development, as well as driveways in the stretch of Bethesda between Wisconsin and Arlington Boulevard. From this study, Transportation Planning Staff concluded, at least preliminarily, that “the composite result[s] of the proposed roadway improvements, the increased number of public parking spaces and the private residential and commercial development will increase congestion at all of the simulated intersections.” Exhibit 43, Attachment 1, p. 5. As stated by Mr. Wells, in his traffic analysis report (Exhibit 38(g), p. 66, ¶5), “The programmed and planned pedestrian/bicycle improvements would result in longer motorist delays and vehicle queues.” He notes (p. 66, ¶4) that the Synchro/Sim analysis “demonstrates the trade-off between (1) pedestrian and bicycle safety and convenience and (2) vehicle delays and queues.”

⁶ The transcript repeatedly refers to the word “queue” as “cue,” the correct spelling for a different word. The Hearing Examiner has substituted the correct spelling for “queue” throughout the quote.

The changes in traffic flow anticipated from the realignment of Woodmont Avenue can be seen by comparing the following two diagrams from Exhibit 53. The first, Exhibit 53(h), shows the existing circulation pattern, and the second, Exhibit (53(i) shows what is proposed.



Transportation Planning Staff highlighted the difficult choice faced by the transportation planners for this project (Exhibit 43, Attachment 1, p. 5):

What is evident is the need to choose between the advantages of better pedestrian access and amenities and the ability to process a larger number of vehicles efficiently through the intersection. Initial results indicate that substantial queues may result along both Bethesda and Woodmont Avenues during the evening peak period. These queues would negatively affect adjacent parallel facilities, such as Arlington and Wisconsin Avenues. Substantial queuing would also impede access to existing adjacent properties and driveways.

Mr. Wells suggests that there is a need to take action to mitigate the traffic congestion anticipated from the project. Technical Staff determined that (Exhibit 43, p. 17):

there are several mitigation measures that are available to address the concerns. Restricted turning movements, additional turn lanes, changes in traffic signal timing, and revising the proposed “neck downs” will be considered during the review of the Preliminary Plan to address the need to improve traffic operations.

It is clear that the difficult trade-off between pedestrian and vehicular traffic in the area will require additional attention in the future detailed planning by DPW&T, and at Site Plan and subdivision reviews by the Planning Board. These ongoing concerns are reflected in both the Transportation Planning Staff’s report cited above and in the Planning Board’s letter approving the “mandatory referral,” which calls for continued review of the details of the proposed garage, continued analysis of the ultimate location, operation and alignment of the to-be-relocated Woodmont Avenue, continued communications with all concerned parties regarding the proposed design and operation of the roadways fronting on Lots 31 and 31A, and “[f]urther analysis to demonstrate how needs for both pedestrian and vehicular demands are accommodated.”

In sum, the traffic study in this case found all projected CLV readings to be within the County’s 1800 standard for the involved intersections; however, the Synchro/Sim traffic operations analysis determined that proposed changes to the configuration of Woodmont Avenue and other proposed

modifications would result in improved pedestrian and bicycle flow and safety, but decreased vehicular flow. These transportation concerns cannot be resolved at the zoning stage, but the Hearing Examiner believes it is necessary to highlight their existence so that the Council is aware of these important issues.

5. Conformance with the Master Plan

The subject site is located within the area governed by the *Bethesda Central Business District (CBD) Sector Plan*, approved and adopted in July, 1994. More specifically, Lot 31 is within the Arlington Road District of the Sector Plan and Lot 31A is within Wisconsin South Corridor District, as defined by the Sector Plan. This distinction accounts for the different zoning recommendations contained in the Sector Plan with regard to the subject site. Lot 31 is recommended for the TS-M Zone that is sought by Applicant, but Lot 31A is recommended for its current CBD-1 classification, with its use anticipated as public parking. Sector Plan, p. 125, Figure 4.34. Nevertheless, the Hearing Examiner agrees with Applicant that the Sector Plan did not envision that the Lot 31A portion of the subject site would be combined with Lot 31 by the County's Parking Lot District as a single development project, with the Public Parking Garage expanding beneath the entire site. Zoning Ordinance §59-C-8.21(a) expressly provides that "the TS-M zone may be [*sic*] also be used within a Central Business District if the property immediately adjoins another property outside a Central Business District that is eligible for classification in the TS-M zone or separated only by a public right-of-way from property outside a Central Business District that is eligible for classification in the TS-M zone." That is precisely the case here. As such, the Sector Plan should be interpreted to give effect to its underlying intent for the area, and not strictly in accordance with its CBD-1 recommendation for Lot 31A.

The Sector Plan's first objective for the Arlington Road District is to "*Preserve and enhance the Arlington Road District as a community retail and service business area,*" but it also has the final

objective of “*provid[ing] additional housing*” in the area. Sector Plan, p. 132. Thus, the proposed mixed-use (retail plus residential) project is consistent with the Plan’s first and last objectives for the Arlington Road District.

The Sector Plan’s second objective for the Arlington Road District is to “*Concentrate redevelopment along Bethesda Avenue, with special focus at the intersection of Bethesda Avenue and Arlington Road as the center of the District.*” The planners had obviously anticipated that the intersection of Bethesda Avenue and Arlington Road would be the center of activity in the Arlington Road District, but subsequent development around the intersection of Bethesda and Woodmont Avenues (*e.g.* the opening of Barnes and Noble and other stores) has shifted that center of activity to the east. Hence, the second part of the Sector Plan’s second objective, calling for a focus at Arlington Road and Bethesda Avenue, has been superceded by events. However, main part of the second objective, calling for concentrated redevelopment along Bethesda Avenue, would be well served by the proposed project, as would the other objectives of the Plan – continuing the “main street” shopping character along Bethesda Avenue, protecting the surrounding residential areas from commercial intrusions and improving traffic circulation, pedestrian safety amenities and convenience.

The Sector Plan specifically addresses Lot 31 in both its overall recommendations for the Arlington Road District (p.134) and in its Urban Design Guidelines (p.137). The Sector Plan provides the following recommendations for Lot 31:

The Plan encourages exploration of creating a staging area for users of the Capital Crescent Trail on a portion of Lot 31. When future parking demand indicates a need for structured parking on Lot 31, the Plan recommends a combination of mixed-income housing and parking on the site. The project should also include ground floor retail along Bethesda Avenue to continue the “main street” concept. Below-grade and some surface parking should be provided to meet the requirements of the Parking District, in addition to parking for the residents and retail customers. . . . The Plan designates the site as a transit station development area and as appropriate for the TS-M Zone. The base zone would remain R-60. About 100 housing units could be

provided at heights that are compatible with the adjacent neighborhood. Representatives of the Sacks neighborhood should be included in all stages of planning and design for this site. (See Public Parking Lot 31 illustrative in Appendix B.) A final decision to build housing and public parking on this site will be made by the County government based on an analysis of economic feasibility and the impact of redevelopment on the ability of the Parking Lot District (PLD) to meet the parking demands of retail shoppers and the advisability of providing a staging area for use by the Capital Crescent Trail.

The Urban Design Guidelines for Lot 31 are listed on page 137 of the Sector Plan:

- a. Continue the main street character in developing retail frontage along Bethesda Avenue and a portion of Woodmont Avenue.*
- b. Limit heights to 3 to 5 floors and vary rooflines for visual interest. The greatest height and bulk should be located primarily on Bethesda Avenue. The building(s) should step down to a lower height and be no closer than 50 feet from the Property line of the houses in the Sacks neighborhood. The building design should express a residential character that is compatible with the neighborhood.*
- c. Provide landscape screening along the southern edge of the site as a buffer with the adjacent houses.*
- d. Ensure pedestrian and bicycle access to the Capital Crescent Trail and provide a Class I bikeway along Bethesda Avenue, in accordance with the Bicycle Network Plan (Fig. 5.7).*

The Hearing Examiner finds that the proposed project is consistent with the specific recommendations in the Sector Plan for Lot 31. As stated by Technical Staff (Exhibit 43, p. 8),

In the Arlington Road District, the project provides the recommended residential component in the TS-M Zone as part of a joint development with public parking. It steps up from three to five stories and provides a setback of 50 feet to provide compatibility with the adjacent single-family detached neighborhood. It also improves bicycle access, provides streetscaping, and establishes a main street character along Bethesda Avenue.

The Hearing Examiner would also add that the proposed project would provide ground-floor retail, a “combination of mixed-income housing and parking on the site,” and appropriate screening from the single-family Sacks subdivision to the south, all called for in the Sector Plan.

With regard to transportation, the Sector Plan specifically addresses the need for improvement to the Bethesda Avenue and Woodmont Avenue intersection as follows (p. 154):

Improve pedestrian crossing at this angled intersection by reducing the pavement width of the free-right that turns onto Bethesda Avenue to lessen the pedestrian's exposure to turning vehicles and providing neck-downs where appropriate. MCDOT should consider the convenience and safety and pedestrians and cyclist in any revised design for this intersection. Lights should be timed so that pedestrian may cross in all directions at 3-feet per second.

Technical Staff found (Exhibit 43, p.8), and the Hearing Examiner agrees, that:

The proposed development is consistent with the transportation recommendations including public parking included in the Sector Plan (page 143-186). The intersection of Bethesda Avenue and Woodmont Avenue will be improved by reducing the width of this intersection and increasing the safety and convenience for pedestrians and bicyclists. The new public parking structure will include joint development with residential and retail uses.

The proposal provides the recommended bicycle improvements in the Capital Crescent Trail area (page 159). The Development Plan shows that the applicant would build a connection from a bike drop-off on Woodmont Avenue to the Capital Crescent Trail.

The public right-of-way will be 60 feet along Bethesda Avenue and 80 feet along Woodmont Avenue as recommended in the Sector Plan. Sidewalks will be substantially improved along both streets.

A few additional words should be said about the Sector Plan's objectives, recommendations and guidelines (pp. 123-127) applicable to Lot 31A in the Wisconsin South Corridor. The Sector Plan lists the objectives of supporting "*a diverse specialty - and community-serving retail environment, including adequate short-term parking facilities,*" and providing "*additional housing to encourage uses that are compatible with nearby residential areas.*" *Sector Plan, p. 124.* Applicant's proposal would meet these objectives by providing a mixed-use (residential/retail) building with short-term parking below.

The Sector Plan recommends confirming the CBD-1 Zone, but also supports “*mixed-use projects containing a residential component.*” It also recommends that “[g]round floor retail should be provided on such projects.” *Sector Plan, p. 124.* That is precisely the type of project being proposed by Applicant.

The applicable Urban Design Guidelines (p. 127) call for 20 foot setbacks, 75 foot height limits and a “compatible transition” from single-family residences across Woodmont Avenue.⁷ Setbacks from the street are difficult to determine at this point since the final contours of the Woodmont Avenue realignment have not yet been decided. Thus, street setbacks will have to be determined at Site Plan, although Applicant has committed to a 50 foot setback from the southern property line west of Woodmont, to provide additional buffer to the homes in the Sacks Subdivision, and setbacks on the eastern property line, adjacent to the Seasons Building, beginning at 5 feet (at ground level) and increasing gradually to 15 feet (at and above the second floor level). *See Exhibit 56.*

The Sector Plan recommends a height limit of 75 feet in the Wisconsin South Corridor District for the express purpose of stepping down heights from the Metro Core and establishing compatibility with nearby residential areas. The mixed-use project includes a building height of 90 feet east of Woodmont Avenue (transitioning to 65 feet at Woodmont Avenue), which is 15 feet over the Sector Plan’s recommendation. Because Applicant is including MPDUs (and WFDUs) in its proposal, it is relying on Zoning Ordinance §59-D-1.61(a) to “exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan.” As required by the statute, this request was reviewed by the Alternative Review Committee (ARC), which determined that the project would not be financially feasible without the additional 15 feet of height, east of Woodmont Avenue. Exhibit 46. Based on

⁷ A fourth urban design guideline is irrelevant since it applies only to a “Tudor Style Shopping Complex” between Leland and Walsh Streets.

this finding,⁸ the Planning Board recommended that Applicant be permitted the increased height, in order to “increase the inventory of affordable housing units in the Bethesda CBD.” Exhibit 45, p. 4.

The Hearing Examiner also finds that the increased height of the Lot 31A building will not adversely affect compatibility with nearby development because it is adjacent to a building (the Seasons) which is 143 feet tall, according to Technical Staff (Exhibit 43, p. 9), and the Lot 31A building will be stepped down to 65 feet at Woodmont Avenue. Technical Staff concluded, as does the Hearing Examiner, that the proposed development is compatible with adjacent development.

In sum, the Hearing Examiner concludes that the proposed development is consistent with the goals and objectives of the Bethesda CBD Sector Plan, and though not consistent with the zoning and height recommendations for Lot 31A, those recommendations should not be dispositive in this case. A master plan is only a guide where, as here, the Zoning Ordinance does not make it mandatory. *See Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). The ARC process, established by the Council in the Zoning Ordinance, actually makes it more difficult to vary from the Sector Plan by requiring the Applicant to establish that it would not be financially feasible to include MPDUs and still meet the Sector Plan’s height and density limitations.

⁸ One member of the Alternative Review Committee, Elizabeth Davison, Director of DHCA, testified at the June 27, 2006 hearing, and indicated the County’s support for the project. Tr. 24-34. The Hearing Examiner raised the issue of whether participation of County officials in the ARC process constituted a possible conflict of interest because the County owns the subject site and contracted with Applicant to manage rezoning and construction, which includes building a County garage. Tr. 28-34. Ms. Davison testified that in another zoning case (G-842/DPA 06-2), in which she had an even more direct interest since her agency owned the land involved in that development, she had asked the County Attorney’s office about the possibility of a conflict, and that office approved her participation by e-mail. No formal written opinion was issued. One could argue that participation of DHCA in the ARC review (part of the development review process) gives at least the appearance of a conflict, and renders the ARC review illusory. On the other hand, there may have been no way to avoid this problem. Zoning Ordinance §59-D-1.6(a) requires that the Alternative Review Committee be “composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees.” While using designees might have helped reduce obvious appearance problems, it would not eliminate the underlying problem, because the designee would still be acting on behalf of DHCA. In these circumstances (*i.e.*, the statutory requirement for participation of DHCA in the ARC process), the “rule of necessity” allows the participation of DHCA officials in the ARC proceedings because there appears to be no way of avoiding the conflict or the appearance thereof. *See, Office of the Attorney General of the State of Maryland, Opinion No. 01-004*, 2001 Md. AG LEXIS 4 (January 30, 2001). The Hearing Examiner’s concerns about the objectivity of the ARC review are also alleviated to some extent by the fact that the ARC was assisted in its review by an independent economic advisor under a contract for professional service to M-NCPPC. *See ARC Memorandum of June, 2006, Exhibit 46.*

Both the ARC and the Planning Board approved the additional height requested for the Lot 31A building, and the zoning recommendation has been superceded by the language of Zoning Ordinance §59-C-8.21(a), which permits the TS-M Zone within the CBD when an adjacent lot, or one separated only by a public right-of-way, is eligible for classification to the TS-M Zone. That is the case here, and the reclassification of the entire site to a single zone, the TS-M Zone, is permitted by the Zoning Ordinance and makes sense.

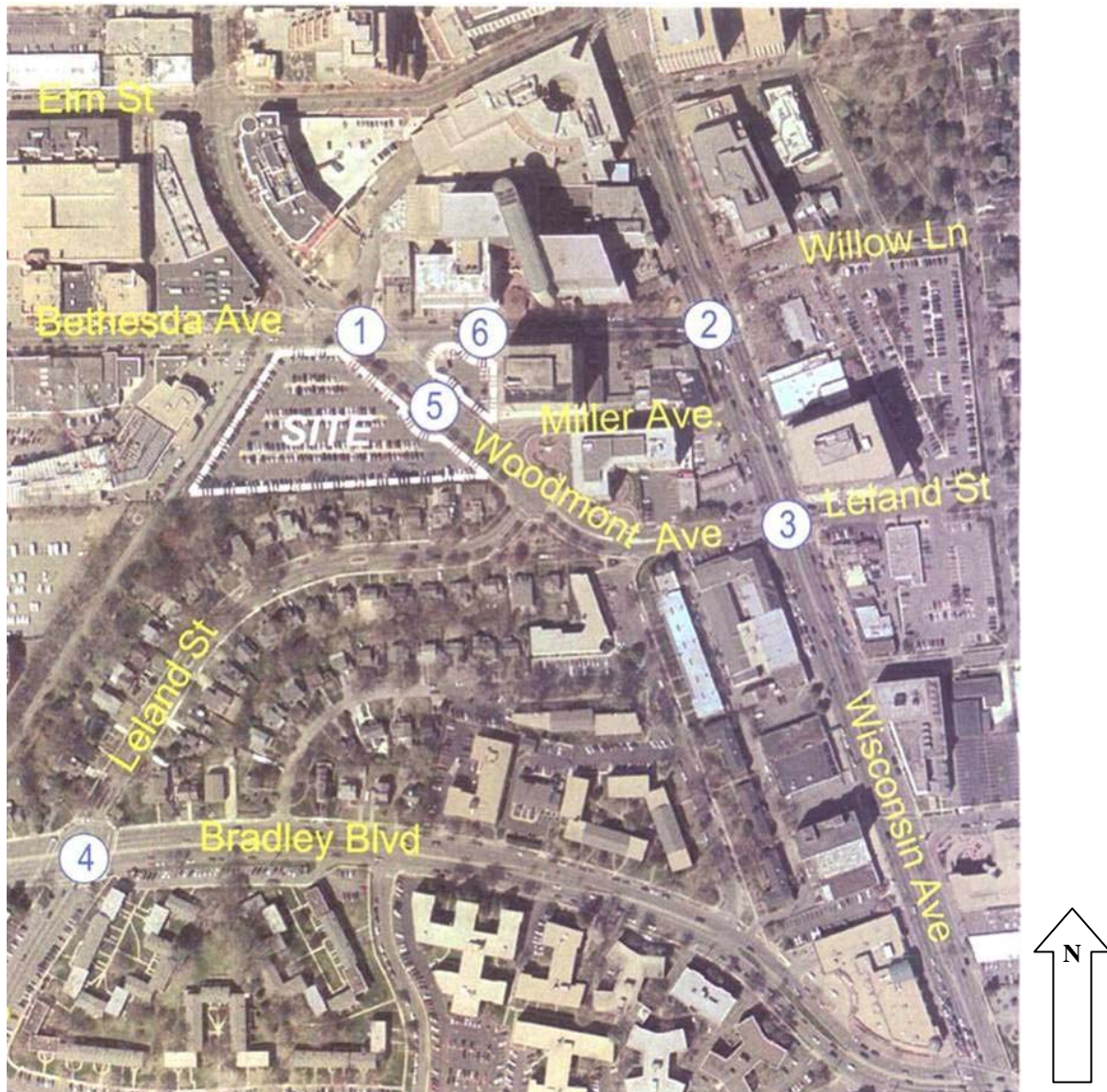
6. Public Facilities (Transportation, School Capacity and Water & Sewer Service)

The County's Annual Growth Policy (AGP) and the Adequate Public Facilities Ordinance (APFO) require a review of the availability of adequate public facilities for any proposed development. Applicant provided testimony and exhibits with regard to transportation, schools, water and sewer service and other utilities.

a. Transportation:

Analysis of transportation facilities is complicated in this case because it involves the mixed use private project, the "mandatory referral" to the Planning Board to evaluate the proposed public/private garage and the conversion to private use of Public Parking Lots 31 and 31A, and the right-of-way abandonment along Woodmont Avenue, which was approved by the Council on August 1, 2006, in Resolution 15-1584. This resulted in a three-part traffic study. The mandatory referral and the ROW abandonment were discussed at some length in Parts III.D.3 and 4 of this report, as was the third part of the traffic study, a "Synchro/Sim" traffic operations analysis of the combined impact of the proposed realignment of Woodmont Avenue, the addition of the large underground garage and the mixed use buildings on Lots 31 and 31A. In this section, we will discuss briefly the two conventional LATR studies done by Applicant's transportation planner, Martin J. Wells. *See Exhibit 38(g) and Tr. 188-218.*

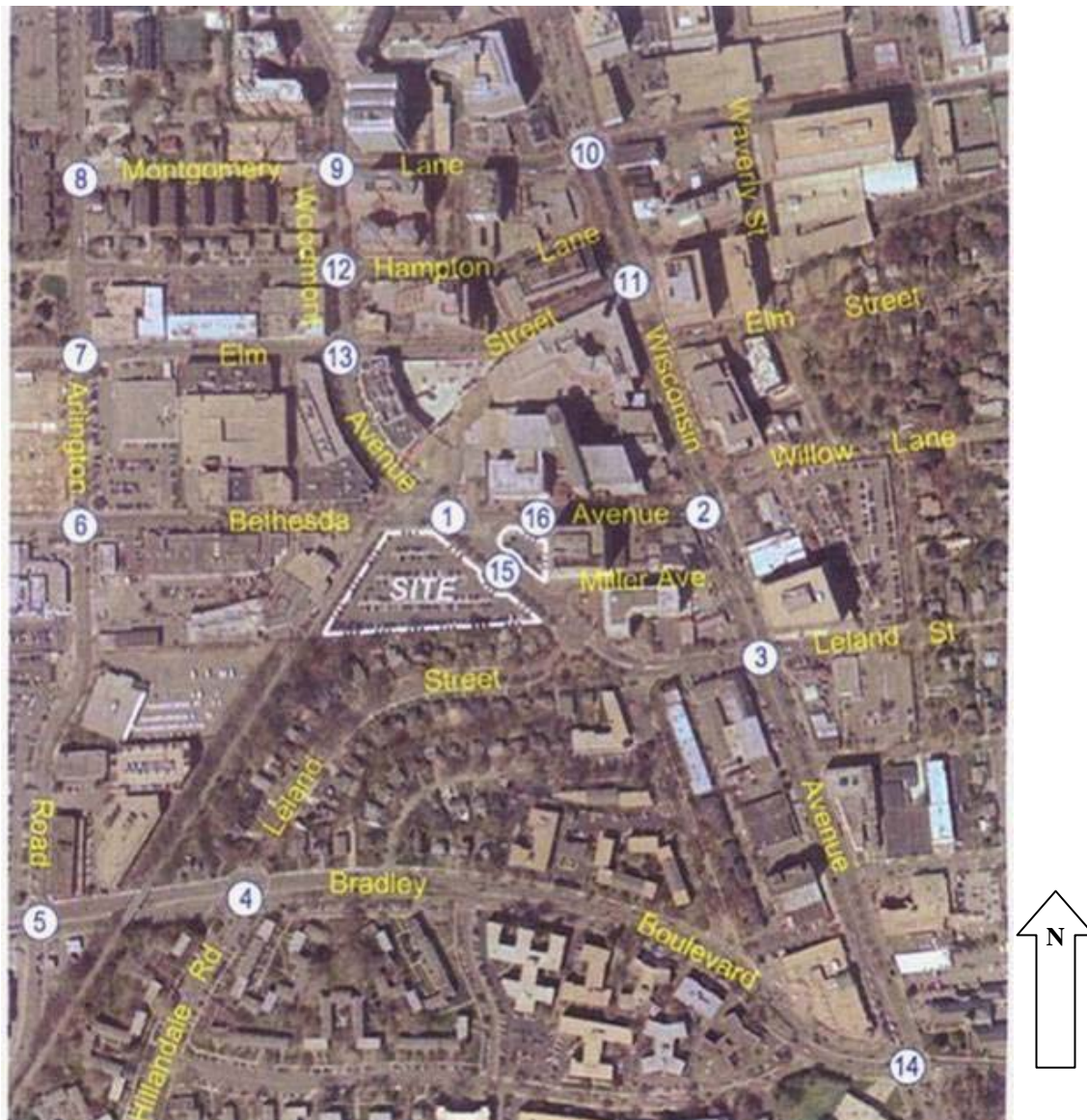
Mr. Well's first study evaluated the impact of the proposed mixed-use project on critical lane volumes (CLVs) at nearby intersections. In his LATR report (Exhibit 38(g)), the first study is labeled "Lot 31 Associates Local Area Transportation Review." In that study, Mr. Wells evaluated critical lane volumes (CLVs) at four intersections surrounding the subject site and at the two vehicle access points to the site, as shown below on Figure 2-8 from the LATR report:



Mr. Wells testified that the rezoning application (*i.e.*, the mixed-use project) would generate 100 a.m. peak hour trips, and 179 p.m. peak hour trips. There were no other developments in the pipeline

for the area analyzed in this first part of the LATR traffic study; however, Mr. Wells also considered the impact of the road modifications which will be constructed by DPW&T and by Applicant. He determined that the resulting CLVs at all intersections would still be well below the County's CLV standard in this area of 1800, and that pedestrian safety and convenience would be enhanced. Exhibit 38(g), p. 24.

The second part of Mr. Well's study, which is labeled "Mandatory Referral Local Area Transportation Review" in Mr. Well's report, evaluated CLVs at 14 surrounding intersections and at the two garage entry points, as shown below in the map from Figure 3-12 of the traffic study:



Mr. Wells found that the public garage would generate about 279 a.m. peak hour trips, and 716 p.m. peak hour trips distributed over two driveways. After factoring in the three other constructions projects currently in the pipeline for the study area, Mr. Wells determined all the intersections would continue to operate well within the 1800 CLV congestion standard. Exhibit 38(g), p. 49.

It is clear from Mr. Well's CLV analysis that the proposed project and the garage will meet current County CLV standards; however, as mentioned elsewhere in this report, Mr. Well's "Synchro/Sim" traffic analysis (the third part of the LATR traffic study) demonstrates that "[t]he programmed and planned pedestrian/bicycle improvements would result in longer motorist delays and vehicle queues," and that there is a "trade-off between (1) pedestrian and bicycle safety and convenience and (2) vehicle delays and queues." Exhibit 38(g), p. 66. The planners will have to wrestle with these trade-offs at subdivision and site plan review. Various traffic mitigation measures are being considered, including restricted turning movements, additional turn lanes, changes in traffic signal timing, and revising the proposed "neck downs" of the traffic lanes. Technical Staff Report, Exhibit 43, p. 17.

Mr. Wells testified that, in his opinion, the access points to the proposed project will, in fact, be safe, adequate and efficient. With regard to safety of the Woodmont-Bethesda intersection, Mr. Wells opined that the geometric changes that are proposed will make existing conditions safer by reducing the pedestrian crossing distances and by reducing the steep angle from 45 degrees to 55 degrees, more or less. It will be more of a regular intersection.

With regard to efficiency, Mr. Wells testified that the streets and sidewalks "will operate in the fashion that is typical of most other vibrant successful central business districts." He believes that "we're very close to finding the appropriate balance between pedestrian concerns, vehicular concerns, public transportation, private automobiles, service and emergency vehicles." He noted that the

proposed driveways to the garage are located as far as practicable from the Woodmont-Bethesda intersection.

Mr. Wells opined that the internal design of the garage is adequate and efficient, in that the single point of revenue control has an advantage for “way-finding” and directional signage. There will be adequate stacking and queuing capacity inside the garage, and the placement of the garage driveways and modifications to Woodmont Avenue at Leland Street and Miller Avenue will minimize any adverse traffic impacts on the surrounding community. Therefore, in Mr. Wells’ opinion, the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate and efficient.

Mr. Wells concluded that the proposed project and the access points will achieve an appropriate balance of safety, convenience and amenity for the residents of the development and neighboring areas, and would be in the public interest.

Based on the entire record, the Hearing Examiner finds that transportation facilities will be adequate for this project and that access and circulation will be safe, adequate and efficient for both vehicular and pedestrian traffic.

b. School Capacity:

The subject property is located in the Bethesda-Chevy Chase cluster. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School’s (MCPS), stated in a letter dated April 5, 2006 (Attachment 4 to Exhibit 43):

This rezoning would result in 245 multi-family dwelling units in two, 3 to 9-story buildings. Based on average yield factors derived from the Maryland National Capital Park and Planning Commission 2003 Census Update Survey, the impact of this project is estimated to be approximately twenty (20) elementary, ten (10) middle and eleven (11) high school students.

This property is located within the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. Enrollment at Bethesda Elementary School is currently within capacity but is expected to exceed capacity

beginning next year. Enrollment at Westland Middle School currently exceeds capacity but is trending down and is projected to have space available beginning next year. Enrollment at Bethesda-Chevy Chase High School currently exceeds capacity but is trending down and is projected to have space available beginning in 2009-2010

...

The current Growth Policy schools test finds capacity adequate in the Bethesda/Chevy Chase cluster.

Thus, MCPS's own projection is that the Middle School will have space available next year, and the High School will have space available by 2009. Although MCPS projects the Elementary School to be above capacity next year, the AGP schools test finds that capacity is adequate. There is no evidence in the record to the contrary. Therefore, the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development.

c. Water and Sewer Service and Other Utilities:

The subject site is served by public water and sewer systems, and is currently in Water Service Category W-1 and Sewer Service Category S-1. In an e-mail attached to the Technical Staff report, staff at the Washington Suburban Sanitary Commission (WSSC) indicated that changing the zoning category from the R-60 and CBD-1 Zones to the TS-M Zone would not have any significant any impact to the water or sewer systems. The report of Applicant's civil engineer, Exhibit 13, reveals the following information regarding availability of utilities:

Water

There is an existing 16-inch water main (WSSC Contract Numbers 37278 and 38306Y) located north of the Subject Property within Bethesda Avenue. There is also an existing 16-inch water main (WSSC Contract Number 4284) located adjacent to the west property line.

* * *

In any event, the public water supply available to serve the Proposed Project will be easily accessible and adequate to serve the anticipated needs and demands of the Proposed Project.

Sewer

There is an existing 12-inch gravity sewer main (WSSC Contract Number 846184 A)

located north of the Subject Property within Bethesda Avenue. There is also an existing 8-inch gravity sewer main (WSSC Contract Number 430109) located adjacent to the east property line.

* * *

. . . Public sewer is both accessible and adequate to provide sewer service to meet the needs and demands of the Proposed Project.

* * *

Gas

Washington Gas is available and adequate to serve the Proposed Project. A six-inch gas line runs along Bethesda Avenue and will be the source of natural gas to serve the site.

Electricity

The underground electric lines in the Bethesda and Woodmont Avenue rights-of-way are serviced by Potomac Electric Power Company (PEPCO). Electricity will be provided to serve the Proposed Project from the existing, adjacent lines.

Telephone and Fiber Optic

Telephone lines are located underground along Bethesda Avenue and Woodmont. A fiber optic line runs through Woodmont Avenue. These lines may be installed within concrete duct banks along with other smaller utilities such as Cable TV to provide services to the Proposed Project.

As stated by Technical Staff, “The public facilities are adequate to serve the proposed development . . .” Exhibit 43, p. 6. The Hearing Examiner so finds.

7. Environmental Issues

No environmental issues were raised in this case; however, “green building techniques” may be required to comply with energy standards. Technical Staff noted that the site is not located in a Special Protection Area or Primary Management Area. It has no steep slopes or erodible soils, and there are no wetlands or streams on the site. Exhibit 43, p.17.

a. Forest Conservation:

According to Technical Staff, one-half acre of afforestation will be is required to meet the requirements of the Forest Conservation Law. This can be accomplished off-site or on-site through tree cover. Technical Staff states that “[a] combination of street trees in the public right-of-way and

additional landscaping in the setback area from the existing neighborhood will meet the requirement.”

Exhibit 43, p. 18.

b. Stormwater Management and Sediment Control:

The site is located in the Willett Branch subwatershed of the Little Falls watershed. Environmental Staff reports that the Countywide Stream Protection Strategy (CSPS) assesses this tributary as having overall poor conditions. Attachment 2 to Exhibit 43. The CSPS recommends supporting cost-effective stormwater quality controls on this redevelopment site. An approved stormwater management plan is required at the time of the approval of the Preliminary Plan.

Applicant’s engineer, Frank Bossong, IV, testified that currently there are no storm water management facilities on either Lot 31 or 31A, or within the Woodmont Avenue or Bethesda Avenue right-of-way. Storm drain runoff from the existing parking lots currently is collected in public storm drainage systems in Woodmont Avenue, Bethesda Avenue and the Capital Crescent Trail rights-of-way. Applicant proposes to provide a hydrodynamic facility along Woodmont Avenue, and within the first level of the garage, there will be two storm filter facilities that will use a cartridge filtration system to clean the water and discharge it back into the receiving or existing storm drain lines.

Applicant is requesting a waiver of channel protection volume controls based on the fact that the project will actually reduce the amount of imperviousness. The existing site is approximately 95 to 100 percent impervious right now. Applicant plans to reduce that by about 30 percent, to approximately 70 percent imperviousness. Mr. Bossing described this as “a positive impact” because the reduction in imperviousness will reduce the flow off the property to less than exists today, and the water quality facilities will produce cleaner water runoff. The final storm water concept plan should be resolved at the time of preliminary plan and site plan.

According to Mr. Bossong, sediment control takes care of itself on this type of project since a “large hole” is being created which will hold the sediment. There will also be some perimeter measures around the edge, to protect the system rights-of-way and the Sacks subdivision. There will be very little grading because the builders will be creating a hole and developing up from the garage through the residential component.

Technical Staff reported no environmental issues warranting denial of this application, and the Hearing Examiner finds none.

E. Community Reaction to the Project

1. Community Concerns:

This joint public/private development project has had much support and little opposition in the community. In fact, by the time this case progressed to the public hearing, the closest thing to an opposition witness was a representative from nearby Ourisman Honda, who merely expressed concern that the needs of Ourisman Honda for a place to unload new vehicles not be overlooked during and after construction.⁹ When pressed, Ourisman’s witness, William Deyhle, testified, “We do not object to the project going forward. I guess that's what I need to make clear. But we, I guess, at a later stage, I guess I'm saying we want to be on record is that, in a later stage when it does come to the actual development and restructuring Woodmont Avenue, we would want to be pretty deeply involved in that.” Tr. 41.

Applicant’s transportation planning expert, Martin Wells, testified that Applicant’s Development Plan had provided 110 foot long indents on both sides of Woodmont Avenue which could be used for unloading the longest trucks; however, whether that would be permitted in the public right-of-way was up to the County, not to Applicant. Tr. 211-213. William Siebert, Chief of the Parking Operations

⁹ Ourisman also raised this point in a letter to the Hearing Examiner (Exhibit 42), and in a letter to Technical Staff (Exhibit 44).

Section, Division of Operations, Department of Public Works and Transportation, testified that he will work with Ourisman Honda to find a satisfactory approach to offloading their vehicles. Tr. 58. The Hearing Examiner is satisfied that the concerns of Ourisman Honda are being addressed, and that they do not constitute a basis for defeating or even modifying the proposed re-zoning and development plan.

The only pre-hearing opposition came in the form of a six page letter to Technical Staff, dated April 19, 2006, from Nathan and David Landow, on behalf of “The Seasons, a Maryland Limited Partnership.” The letter outlines their concerns about the impact upon the adjacent “Seasons” building of the plans for the subject project, as they existed at that time. These concerns included the proximity of the proposed garage entry and loading dock to the Seasons’ garage entrance; Applicant’s contention that the parking garage issues were not subject to review as part of the re-zoning application; the proposed 90 foot height of the building in close proximity to the Seasons; the absence of any planned setback from the Seasons’ property line; and anticipated problems with traffic related to changes planned for the right-of-way and access locations.

The Landows’ concerns were alleviated prior to the hearing by changes promised by Applicant, and those compromises are described in Part III.D.2 in connection with the Binding Elements and Development Plan. At the hearing, Martin Hutt, Esquire appeared on behalf of the Seasons, LLC and the Landows, and he expressly withdrew their opposition to the application. He stated that his clients had reached agreement with the Applicant, which is reflected in the revised binding elements, as illustrated in Exhibit 56, and by reduction of the proposed loading dock near the Seasons from a double-wide to a single-wide facility. He concluded by stating that “the Season’s, LLC no longer has any opposition to G-850 and its amended development plan and binding elements.” (Tr. 35-36).

The lack of opposition can be explained, in part, by the public outreach practiced by both the County government and the Applicant. The Montgomery County Government held an open competition for the opportunity to develop this project, and public meetings were held at the Bethesda

Services Center as part of the selection process. Meetings were also held with the adjacent property owners of the single-family detached units in the Sacks Subdivision, as expressly recommended in the Bethesda CBD Sector Plan (p. 134).

2. Community Support:

Attachment 14 to the Technical Staff report (Exhibit 43) contains letters received with regard to this project. Aside from the Landows' letter, discussed above, all the letters are supportive.¹⁰ Two letters, dated May 19, 2006, from the Coalition for the Capital Crescent Trail (CCCT), which represents 2000 members, strongly endorse the project. CCCT comments include the following:

* * *

The developer chosen by the county for this project, Lot 31 Associates LLC, has made every effort to consult with the Coalition as they designed this project. We had many concerns about the design of the intersection, the accommodation of the parking for bike users, and the parking entry and exit points for pedestrian safely. In each of these areas our concerns were listened to and met. The specific points we outlined on our attached letter relating to the mandatory referral¹¹ Similarly, we are very pleased with the care and attention they devoted to our concerns relating to compatibility of the development with trail use.

- We asked that the active retail uses be organized in a way that did not interfere with or detract from the heavy usage of the trail at the Bethesda Avenue trailhead. The plan proposes residential use at the southwest corner, includes convenient elevator access to the parking garage adjacent to the trail, and limits retail nearer to Bethesda Avenue.
- We asked for a convenient drop off access to the trail. The proposal incorporates a circular drop off point on Woodmont Avenue, and an attractive, direct path to the trail at a point close to the public rest area and information kiosk.
- We asked that any outdoor eating areas provided not be adjacent to the trail because of the potential for restaurant patron/trail user conflicts. We are

¹⁰ The Ourisman Honda letter was sent after the Technical Staff report was issued.

¹¹ The referenced letter regarding the mandatory referral notes that CCCT "enthusiastically support[s] the realignment of Woodmont Avenue, the elimination of free right-turn movements on southbound Woodmont Avenue . . . and the proposed alignment of the crosswalk to make a direct connection across these streets for trail users. These changes enhance pedestrian safety, and make a more sensible crossing for continuing trail users." CCCT also praised the proposed location of the garage's entry and exit points, other proposed garage features and the proposed bike drop-off area west of Woodmont Avenue. The letter concluded by noting, "The developers, Lot 31 Associates LLC, have been excellent to work with and have been highly attentive to our requests for consideration of trail users as they designed this submission."

assured that any restaurants with outdoor seating will be located nearer the Bethesda-Woodmont intersection.

Together with the developer, we continue to discuss appropriate enhancements to the trailhead, amenities tailored to trail users, and additional landscaping where the trail abuts this project. Many of these improvements will be presented at site plan. Based on the willingness of the developer to work with us, and their demonstrated understanding of the importance of the trail at this location, we have every confidence that the final project will be sensitive to the trail use, and will be a handsome addition to the urban fabric. We urge you to recommend approval of the rezoning request.

A May 30, 2006 letter from the President of the Sacks Neighborhood Association was equally supportive of the project:

The Sacks Neighborhood Association (SNA) has worked closely with PN Hoffman/Stonebridge Associates in the development of their above-mentioned plan. We have been pleased by their efforts to accommodate the concerns expressed by the residents of our neighborhood. Based on our understanding of the current plan we would like to express our full support for it. SNA looks forward to continuing to work in cooperation with PN Hoffman/Stonebridge Associates to address specific design, construction and traffic matters as they arise.

The final letter attached to the Technical Staff report is from Federal Realty Investment Trust, which has “significant merest and investment in Bethesda Row.” The June 1, 2006 letter makes the following points:

First, the need to improve the Woodmont and Bethesda Avenues intersection is critical to all — residents, Trail users, retail customers, office workers and properly owners. The proposed re-configuration of this intersection achieves critical safety enhancements while meeting the basic needs of vehicles.

Second, there is a significant need for additional parking in the Bethesda Row area. While the County is proposing to expand the public parking provided in this area, the Hoffman/Stonebridge plan carefully balances the need for pubic parking with the practical realities of ingress/egress at a location trying to meet the often conflicting objectives of different interests (*i.e.* single family residential, retail, office, the Trail, etc.). The location of dual points of entry and egress east of Woodmont Avenue but on both Bethesda and Woodmont Avenues is the right solution for the area.

Third, Bethesda Row will welcome and support the proposed mixed income residential opportunities. The balance of a high-rise building east of Woodmont and a mid-rise building west of Woodmont respects the various neighboring properties and uses.

Fourth, the enhanced public spaces will yield significant benefits for the area. Coordination of public amenities at this intersection provides the opportunity to

enhance and expand the success of our public space at Barnes & Noble. The type, location and quality of the planned public spaces will further enhance the perception and reality of Bethesda Row.

In addition to the cited praise from nearby residents, trail users and local businesses, the County has strongly supported this project. Two County officials appeared at the public hearing to express their support for the project, William Siebert III, Chief of the Parking Operations Section, Division of Operations, Department of Public Works and Transportation, and Elizabeth Bradford Davison, Director of the Department of Housing and Community Affairs. Mr. Siebert's testimony was discussed at length in Parts III.D. 3 and 4 of this report, in connection with the proposed public/private garage and the ROW abandonment.

Ms. Davison testified (Tr. 24-34) that DHCA had worked very closely with the DPW&T and the Parking Lot District on this project over the past several years. One of the key elements she emphasized was the addition of affordable housing. Other goals were compatibility with the Sacks neighborhood, preservation or enhancement of the Capital Crescent Trail, and construction of a vibrant urban development that adds to the lively mix in downtown Bethesda. According to Ms. Davison, the selection committee looked at 13 different proposals for this site, and the subject proposal met the goals she highlighted better than others had.

In terms of the affordable housing, she noted that this project would include not only MPDUs, but also workforce housing units, priced and available to people whose incomes are a little bit above the MPDU level (up to 120 percent of area median income). Ms. Davison added that this housing environment would be very desirable in an area such as downtown Bethesda, where there are very few units available to a group in that income range. Given that Bethesda is a major employment center with jobs at virtually every level of income, DHCA felt it was a very important area to include

affordable and moderate income housing.¹²

It should also be mentioned that Martin Klauber, the People's Counsel, expressed his support for the project at the hearing. Tr. 225-231. He noted that there was clearly a need for additional public parking, and "if a deficit of public parking continues unabated, pretty soon people are going to get tired. And they're not going to come here." Mr. Klauber emphasized the need for MPDUs, and found it "wonderful" that the project would supply both MPDUs and workforce housing.

Mr. Klauber also praised the intersection improvements at Woodmont and Bethesda Avenues. He felt that the realignment will help residents and "walkability," and, "hopefully, if that intersection works better, then you won't have people crossing mid block," which would reduce pedestrian deaths. The intersection improvement will also provide a better parking garage design.

Mr. Klauber noted that Applicant had satisfied the very specific urban design guidelines for Lot 31, and had protected the Sacks community from having an above-ground garage nearby, which they feared. Instead, there will be a 50 foot setback, and they will see bicycle riders and a townhouse facade.

Mr. Klauber did indicate that he was highly concerned about the planned redistribution of traffic set forth in Mr. Wells' traffic operations analysis because it affects many people in Bethesda. Mr. Klauber plans to take a very active and specific role in the traffic operations analysis. It is "an extremely important feature," but it is not done at zoning. He emphasized that a very careful balancing will have to occur. "But for today and this afternoon, and for the County Council and this application, I certainly do recommend that it be approved as requested by the applicant and as contained in the record of this case."

In sum, the record in this case is very clear that the proposed development is supported by both

¹² In her testimony, Ms. Davison also mentioned that Applicant had made a two million dollar contribution, which may be used to further affordable housing goals. Tr. 26. The Hearing Examiner feels that this fact should not be considered in reviewing a re-zoning application because it does not bear on any of the factors the Zoning Ordinance specifies for evaluating these cases. This issue was also discussed with the parties at the hearing. Tr. 226-233.

the community and the County government, and that by the date of the hearing, there was no opposition to the application.

IV. SUMMARY OF THE HEARING

The hearing in this case took place on June 27, 2006. Applicant called seven witnesses, Douglas M. Firstenberg and Lamont Hoffman, managing members of Applicant, Lot 31 Associates, LLC; Meral Iskir, an architect; Douglas Wrenn, an expert in urban planning; Anne Dowell, a landscape architect; Frank Bossong, IV, a civil engineer; and Martin J. Wells, an expert in transportation planning and traffic engineering.

Two government witnesses testified, Elizabeth Davison, Director of DHCA, and William Frederick (Rick) Siebert III, Chief of the Parking Operations Section, Division of Operations, DPW&T. Attorney Martin Hutt appeared on behalf of the Landows, who own the property (the Seasons) adjacent to Lot 31A, to the east, and William Deyhle testified on behalf of Ourisman Honda, the automotive dealer located immediately to the west of Lot 31 and the Capital Crescent Trail. People's Counsel participated but called no witnesses.

A. Applicant's Case

1. Douglas M. Firstenberg (Tr. 64-108):
2. Lamont Hoffman (Tr. 64-108):

Douglas M. Firstenberg testified on behalf of Stonebridge Associates, a development firm headquartered in Bethesda. Applicant, Lot 31 Associates, LLC, is a Delaware limited liability company formed by PN Hoffman, a builder, and Stonebridge Associates to manage development of Lot 31. It was the successful applicant to Montgomery County in the RFP process to gain the development rights for the site.

Lamont Hoffman testified on behalf of PN Hoffman, a builder headquartered in Northwest Washington, D.C., where almost all of its business is located. PN Hoffman concentrates on mixed use projects in established and emerging neighborhoods. According to Mr. Hoffman, his company is very proficient at community outreach and working within very tight urban areas. Many of its projects are very similar to Lot 31.

Stonebridge Associates has been involved in several projects in the Bethesda Chevy Chase area, and primarily focuses on “urban infill,” mixed use projects that have lots of complexity just by the inherent nature of developing in urban areas. Mr. Firstenberg testified that the County was looking for a public private project to meet the needs for additional parking in the south quadrant of the Bethesda Central Business District. The County also wanted a significant affordable housing component, in a project that would comply with the Sector Plan. The County wanted the developer to come up with ideas that would enhance and improve the neighborhood, and would also foster a great deal of neighborhood support and cooperation for the various aspects of the project.

Mr. Firstenberg stated that there are three main components to this project, two of which are public. The biggest is the public parking garage. There are also the reconstruction of Woodmont Avenue and the private improvements planned for the site. The entire property will be a single lot of record, and at the time of land transfer, Applicant will form a land condominium with several component parts. The County will own all of its public parking area and the ramps for the public parking garage. Applicant will have private parking, and there will be reciprocal easements where necessary to allow for cross-use between the public and private components.

Messrs. Firstenberg and Hoffman made a PowerPoint presentation. They noted projects their companies had developed, and described the request for proposals (RFP) process they participated in for the subject site. Mr. Firstenberg noted that Applicant had worked very hard to understand the County’s wishes and to reach out to the community, especially the Sacks Subdivision adjacent to the

site. He described Applicant's "vision" for the project with a slide (Exhibit 59, p.2):

Hoffman/Stonebridge Vision

- ❑ "Complete" Bethesda Row
- ❑ Create a Vibrant Urban Landmark That Solves Public Parking
- ❑ Service and Expand the Use of the Capital Crescent Trail
- ❑ Integrate Affordable and Market Rate Home Ownership – "Mixed Income Urban Living"
- ❑ Achieve Compatibility with Community
- ❑ Provide Safe Mobility for Both Pedestrian and Vehicular Traffic – "Pedestrian First Approach"

Another slide described the public improvements which would be a part of the project:

Public Improvements (Non-Discretionary) – Mandatory Referral

- ❑ Incorporated Underground public parking structure
- ❑ Provided two separate means of ingress/egress to public parking garage
- ❑ Established a single point of control with adequate stacking within garage
- ❑ Realigned Woodmont Avenue
- ❑ Improved intersection of Woodmont Ave. and Bethesda Ave.
- ❑ Integrate mixed-use project and public improvements with "community"
- ❑ Improve pedestrian safety and accessibility to Capital Crescent Trail

Mr. Firstenberg indicated that multiple means are provided for the pedestrians to get out of their cars and up to the retail stores. There will be three different locations to do that, including oversize elevators that will accommodate bikes. Applicant also committed to ventilating the garage exhaust through the roof of Lot 31, taking the burden away from the residential neighbors to the south

and the pedestrians who would be walking around the project. After discussing the design features of the planned garage, Messrs. Firstenberg and Hoffman turned to a side summarizing the “project fundamentals:”

Project Fundamentals

- Integrate mixed-use project and public improvements (non-discretionary) with “community”
- Improve intersection of Woodmont Ave. and Bethesda Ave.
- Enhance pedestrian/bicycle safety and connectivity in Bethesda
- Expand accessibility to Capital Crescent Trail
- Include diverse and significant public amenities
- Provide significant affordable housing component

Mr. Hoffman emphasized that Applicant took a “pedestrian first” approach to the project. He discussed the realignment of Woodmont Avenue, the necking down of the roadway to make the intersection more crossable by pedestrians and the fact that, when it is reopened, it will continue to function as a route parallel to Wisconsin Avenue. He noted that by making the loading dock smaller, it increased the separation from the access to the Seasons’ garage. The loading dock is hidden from view within the building.

Mr. Hoffman testified that there is a mix of uses completely surrounding this property. Applicant decided to make this project a “four sided building” so that it attempts to face each use in its appropriate way for the purpose of compatibility. The bike drop off which is to the south and east of the property links to the Capital Crescent Trail and provides the needed buffer to help protect the single-family home community to the south. The south and west corner of the site, employs a townhouse style construction intended to bring the massing down to a more human scale, more

compatible with the single-family homes in the Sacks community immediately to the south. These two-story townhouse style condominiums also turn towards the Capital Crescent Trail to make that a more pleasant experience for those utilizing the trail. There's also a courtyard in the center of the building to break up the townhouse row along that south perimeter, and to open up light and air and have view corridors inside. The bicycle drop off area, which is to the south and east corner, links to the trail that is in front of the townhouses. A bicycle depot symbolizes the trail, and would allow people to gather.

Looking at the perspective from Woodmont going south, Lot 31A is out to your left and Lot 31 is to your right. Applicant wanted the buildings to form a sort of arc embracing the intersection, and to break them down into smaller looking buildings so they do not overwhelm the intersection.

Mr. Hoffman described Applicant's efforts to vary the view of each side of the proposed buildings to be compatible with surroundings, and yet relate to each other. According to Mr. Hoffman, the corner of Bethesda and Woodmont, which would be the southeast corner of the property, is very important, and "it is probably the most overt location on the project." Therefore Applicant wants to animate it with a café or restaurant of some sort, preferably with some outdoor seating to show life and energy of that intersection.

Mr. Hoffman summarized the mixed use project as having maximum 250 dwelling units and 40,000 square feet of retail space. Up to 35 of the units would be workforce housing and there would be 12.5% MPDUs. The east building (Lot 31A) would be up to 90 feet, as permitted by the ARC finding on financial feasibility and the Planning Board recommendation, and the west building would be 65 feet. The previous plan for a clock tower above that is no longer in the plans. Mr. Hoffman also explained the new setbacks from the Seasons building that had been agreed to in order to make the buildings more compatible. The project will be undertaken in a single phase, and would hopefully start in the second quarter of 2008. Woodmont Avenue would have to be closed for 20 to 21

months, and the new garage will not open until the ventilation through the roof of the Lot 31 building is ready, probably 26 months after the start. The plan is to have the whole project completed within 36 months.

Mr. Hoffman testified that thought is being given to how to reroute traffic and keep the public informed during construction. Mr. Firstenberg indicated that the areas of the passive and active recreation and the common areas and quasi-public spaces on the property will be maintained by either hiring Bethesda Partnership to maintain them, or the condominium regime would be responsible for their long-term maintenance.

Messrs. Firstenberg and Hoffman testified that they both intended to be bound by the binding elements in the development plan.

3. Meral Iskir (Tr. 109-121):

Meral Iskir testified as an expert in architecture. She stated that the architectural plans are in the concept design, or early preliminary design stage. Ms. Iskir indicated that the first goal as an architect is to create a space. In this case, given the location, it is important to celebrate the existing Crescent Trail and the existing energy in the Bethesda Row area, and to be compatible with the surroundings. In that regard, her focus was mainly on the pedestrian and bike riders comfort and encouragement, and that was kept as core value in the architect's concept in creating the space. In her opinion, the realignment of Woodmont Avenue would create a more secure and less dangerous pedestrian situation. It would improve pedestrian circulation and encourage bike riders and the use of the Crescent Trail.

According to Ms. Iskir, the site is constrained by the nearby commercial and retail on the Bethesda Row portion and the very single-family setting in the Sacks neighborhood that is adjacent to the trail and the property. So the architects had to step up the buildings to match the residential scale in the Sacks neighborhood and at the same time go along with the Woodmont Avenue at the retail

portion and pedestrian walkway circulation. Furthermore, with the public garage underneath, the plans had to be designed to provide a smooth transition from the public use to the private use.

The adjacent Seasons building is approximately 140 feet tall, and Applicant is planning a 90 foot tall building on Lot 31A. The Artery Building, diagonally across from Lot 31A, is about 120 feet or 130 feet tall.

Ms. Iskir opined that the proposed development will comply with the regulations of the TS-M zone as set forth in the Zoning Ordinance, will be compatible with the surrounding land uses, with regard to building height, massing, setbacks and locations of those buildings, and will not create any adverse impacts to surrounding areas based on its architectural elements.

[Applicant's counsel injected that there is a contractual relationship between the County and the Applicant whereby the Applicant is responsible for overseeing the design, but with constant County input.]

4. Douglas Wrenn (Tr. 124-154):

Douglas Wrenn testified as an expert in urban planning.¹³ Mr. Wrenn described the subject property and the surrounding area. Although he had initially defined a surrounding area slightly larger than the one defined by Technical Staff, Mr. Wrenn testified that Applicant accepted Technical Staff's definition of the surrounding area.

According to Mr. Wrenn, this property is appropriate for the TS-M Zone based on three factors. The first is that Lot 31 is in the transit station development area, which makes it eligible for this zoning, and it has been recommended in the Sector Plan for that designation. There is also a

¹³ The witness's oath and the voir dire regarding Mr. Wrenn's expertise are missing from the transcript, which begins his recorded testimony in mid-question on the merits. Tr. 124. Deposition Services, Inc, the company that recorded the proceedings, informed the Hearing Examiner that, for unknown reasons, there is no audio or other recording of the missing portions of Mr. Wrenn's testimony. The Hearing Examiner routinely swears in all witnesses, and the Hearing Examiner's notes indicate that Mr. Wrenn was accepted as an expert in urban planning. Mr. Wrenn has an extensive résumé in land use and urban planning (Exhibit 28), and he has previously testified as an expert before a variety of Montgomery County administrative bodies, including the Hearing Examiner. Given this background, the Hearing Examiner finds that the missing portion of transcript does not prevent a fair evaluation of the witness's testimony as an expert.

recent text amendment to the Zoning Ordinance that allows Lot 31A, which is in the CBD Zone across the public of right-of-way from the transit station development area, to also be eligible for reclassification to the TS-M Zone. So, both Lot 31 and Lot 31A meet that requirement.

Secondly, the property is located where substantial commercial and office uses already exist and where such uses are recommended by the Sector Plan. Thus, the proposed development of this property would be a very logical continuation of the pattern of development that exists now in this area.

Thirdly, the TS-M Zone provides the flexibility necessary to respond to the specific goals and objectives of the Sector Plan for this area. That flexibility is required to meet those objectives.

In Mr. Wrenn's opinion, the proposed zoning and development plan conforms to the six purposes of the TS-M zone, as set up in §59-C-8.23 of the Zoning Ordinance. The first purpose is to promote the optimum use of transit through orderly development, and the proposed development provides for a public parking garage, but more importantly, provides connectivity to the Bethesda Metro Station, which is only 1500 feet away, and to the other transit facilities located in this district that will help optimize the use of transit for the residents and visitors to this portion of Bethesda.

The second purpose is to provide for the needs for those in residence, and the proposed development enhances the overall environment by the inclusion of mixed income and mixed height of residential uses, and by the creation of the street retail and an overall pedestrian circulation environment.

The third purpose is to provide for incidental shopping needs of transit facility riders. In Mr. Wrenn's opinion, the main street retail that is proposed here, completing Bethesda Row, will accomplish that intended purpose. The fourth purpose is to minimize the necessity of the automobile. Mr. Wrenn pointed out that mixed-use developments require less reliance on the automobile for services and amenities. Easy access to the Bethesda Metro will also help meet that purpose.

The fifth purpose is to obtain amenities not available in conventional zoning, and Mr. Wrenn opined that conventional zoning does not allow the flexibility that is required to provide the amenities that are being proposed here, such as the enhancements to the Capital Crescent Trail, the additional landscaping, the drop off for the users of the trail, and streetscape amenities.

The final purpose is to prevent the detrimental effects upon the adjacent properties. In Mr. Wrenn's opinion, what's being proposed is a perfect transition from the more intensely developed portions of Bethesda to the less intensely developed areas to the south, such as the Saks neighborhood, thus preventing any detrimental effect.

According to Mr. Wrenn, the proposed project satisfies the requirements relating to the provision of public facilities and amenities as set forth in Section 59-C-8.25 of the Zoning Ordinance. In this regard, he mentioned the public parking facility, access and utilization of the Capital Crescent Trail, the realignment of Woodmont Avenue, which creates a more regular intersection, and the moderately priced and workforce housing.

Mr. Wrenn testified that the uses proposed by the development plan are permissible land uses as set forth in 59-C-8.3 of the Zoning Ordinance, and the project meets the development standards set out in Section 59-C-8.4 of the Zoning Ordinance. Moreover, the project substantially complies with the stated goals, objectives, the general and specific recommendations in the Sector Plan for this area, and for this property specifically. He noted that the Sector Plan did not envision that Lot 31A would be combined with Lot 31 in a unified redevelopment project. And as such, it focuses a lot of attention on the redevelopment of Lot 31 in terms of use, scale, massing, and those types of issues, but is relatively silent as to Lot 31A. From 1994 when the Sector Plan was adopted to today, quite a bit of time has elapsed and things have changed. In determining the best way to approach the redevelopment project that would meet these public needs, as well as provide for private development opportunities, the decision was made to combine both of those lots into one unified redevelopment project. In Mr.

Wrenn's opinion, one should interpret what the intent of the Sector Plan would have been for Lot 31A based on the recommendations for Lot 31.

Mr. Wrenn then discussed the objectives and guidelines of both the Arlington Road District and the Wisconsin South Corridor contained in the Sector Plan, and indicated how the project meets those objectives and guidelines. He noted that the 75 foot height restriction recommended for the CBD-1 Zone in the Wisconsin South Corridor should no longer apply because the buildings around Lot 31A, the Seasons and the Artery buildings are both approximately 143 feet in height. Thus, a 90 foot tall building, which is proposed, with a step down to 65 feet on the western side, would be more compatible with the existing structures, and with the building planned for Lot 31 across Woodmont Avenue. He pointed out that both the ARC and the Planning Board had recommended approval of the additional height for the Lot 31A building. The Lot 31 building would meet the standards recommended in the Sector Plan.

Mr. Wrenn concluded that the proposed development would be compatible with adjacent development and land uses and would provide for the maximum safety, convenience and amenity of the residents of the development. He also opined that it would be in harmony with the general plan of development for the County and will cause no adverse impact on the surrounding properties. Finally, he opined that the development would be in the public interest, in that it accommodates public parking, provides enhancements to the Capital Crescent Trail, and offers affordable housing in this location in Bethesda, which is an important public policy goal.

5. Anne Dowell (Tr. 155-168):

Anne Dowell testified as an expert in landscape architecture. She described the "open space" on Exhibit 38(c) as everything in green on the exhibit. The public amenities, or "passive active recreation" space is shown as stippled. Applicant proposes a minimum of 35 percent public space

(*i.e.*, open space plus active and passive recreation space).¹⁴ Applicant is also proposing a fitness facility within the project.

The planned bike path would connect to the Capital Crescent Trail so that people can take their cars into the bike drop off if they so desire, go down into the garage to park, and pop up through the public elevators to get their bikes and go off on the Capital Crescent Trail for the day.

The plan also calls for the necking down (*i.e.*, narrowing) of Woodmont Avenue for friendly pedestrian access to the intersection at Bethesda and Woodmont. Also, in the binding elements, there is an opportunity to coordinate with the Season's to create a space that is 13 feet off of the Season's and 5 feet off of the face of the Lot 31A building. There will thus be an 18 foot corridor, and Applicant will try to create an amenity space there.

There would be a 50 foot buffer protecting the Sacks subdivision and then the stepping up from the 35 foot maximum height for the townhouse style units. There is a 10 foot terrace back to the higher apartment units, which will give compatibility with the single family housing of the Sacks subdivision.

In Ms. Dowell's opinion, the proposed development would be consistent with what is required for the TS-M zone, a pedestrian friendly mixed use with a linkage to Metro transit. It also furthers the goals of the Sector Plan without any adverse impacts on the surrounding properties. She concluded that the public facilities and amenities provided with this project provide for safe and efficient circulation, adequate public open space and recreation, and ensure compatibility of the development with the surrounding area.

¹⁴ The Hearing Examiner notes that the use of the terms "Public Use Space" and "Open Space" by this witness is quite confusing since Zoning Ordinance §59-C-8.43 calls for a total of "Open Space" of 35% of net lot area., 10 % of which should be "public use" space and 25% should be "active/passive recreation space." The Hearing Examiner is not concerned, however, because Applicant has committed, in binding element #9, to a minimum of 35% open space, the precise contours of which will be worked out at site plan review.

6. Frank Bossong, IV (Tr. 169-187):

Frank Bossong, IV testified as an expert in civil engineering. His firm produced a report describing the property, the natural resource inventory and forest stand delineation (NRI/FSD), existing and proposed utilities, a storm water management concept and sediment erosion controls. He noted that, with two surface parking lots covering a significant portion of the property, there is very little in the way of vegetation or natural resources on the property at this time.

Mr. Bossong further testified that almost all utilities that will be needed for this project are currently located within Bethesda Avenue to the north of the property. There is an existing 16 inch water line on the northern portion within the right of way of Bethesda Avenue. There are a 12 inch sewer line on the southern side of Bethesda Avenue and a 6 inch gas line within Bethesda Avenue. There are also existing electric, telephone and cable. In his opinion they are adequate to serve the proposed development.

According to Mr. Bossong, sediment control takes care of itself on this type of project since a big hole is being created which will hold the sediment. There will also be some perimeter measures around the edge, to protect the system right of ways and the Sacks subdivision. There will be very little grading because the builders will be creating a hole and building up from that for the parking garage and the residential component.

The existing site is approximately 95 to 100 percent impervious right now. Applicant plans to reduce that by about 30 percent, to approximately 70 percent. Currently there are no storm water management facilities on either Lot 31 or 31A, or within the Woodmont Avenue or Bethesda right-of-way. Applicant proposes to provide a hydrodynamic facility along Woodmont Avenue, and within the first level of the garage, there will be two storm filter facilities that will use a cartridge filtration system to clean the water and discharge it back into the receiving or existing storm drain lines. Applicant is requesting a waiver of channel protection volume controls based on the fact that the

project will actually reduce the amount of imperviousness. Mr. Bossing described this as “a positive impact” because the reduction in imperviousness will reduce the flow off the property to less than exists today, and the water quality facilities will produce cleaner water runoff. The final storm water concept plan should be resolved at the time of preliminary plan and site plan. Since this is a joint project between Montgomery County Department of Transportation and the developer, there are discussions right now as to who actually would maintain the storm water management facilities.

Mr. Bossong further testified that, due to the lack of vegetation on the current site, Applicant has an option of paying a fee in or planting off site.

In Mr. Bossong’s opinion, the proposed access driveways would be safe, adequate and efficient from a civil engineering standpoint, taking into account grades and site distances. They would meet the requirements of Montgomery County.

Mr. Bossong then explained Exhibit 61, which shows the ROW abandonment and the proposed new ROW for Woodmont Avenue. The entire right-of-way that bisects through Lot 31 and 31A is shown in a red cross-hatch on the exhibit. The entire red area is going to be abandoned, and a new 80 foot right of way shown in a blue cross-hatch on the exhibit will be dedicated for public use.

In Mr. Bossong’s opinion, from a civil engineering standpoint, the proposed development of the subject property will be compatible with the surrounding community and will help promote the public interest, especially with the realignment of Woodmont Avenue and the safety factors that will be achieved by the reconfiguration of the intersection of Bethesda Avenue and Woodmont Avenue.

7. Martin J. Wells.(Tr. 188-218):

Martin J. Wells testified as an expert in transportation planning and traffic engineering. His LATR traffic analysis consisted of three traffic studies in one, a study of the impact of the proposed mixed-use project on critical lane volumes (CLVs) at the surrounding four intersections; a study of the

impact of the proposed public garage on critical lane volumes at 14 surrounding intersections and at the garage entrances; and a “Synchro/Sim” traffic operations study of the combined impact of the proposed realignment of Woodmont Avenue, the addition of the large underground garage and the mixed use buildings on Lots 31 and 31A.

Mr. Wells testified that the rezoning application (*i.e.*, the mixed-use project) would generate modest 100 a.m. peak hour trips, a 179 p.m. peak hour trips. This would result in CLVs at all intersections well below the County’s CLV standard in this area of 1800. The second part of Mr. Well’s study found that the public garage would generate about 279 a.m. peak hour trips, and 716 p.m. peak hour trips distributed over two driveways. Again, all the intersections would operate well within the 1800 CLV congestion standard.

Mr. Wells described the third part of his study, the “Synchro/Sim” traffic analysis, as follows (Tr. 203):

This is a technique that models the flow of individual vehicles through a transportation network. It is a delay based methodology. Again, not typically mandated by the planning board. It takes into account specific traffic signal cycling, phasing, timing, coordination amongst the various signals.

It looks at queuing.¹⁵ It looks at how queues form and dissipate as the traffic signals turn from green to yellow, red and back to green again. And if it a queue would back up into an upstream intersection, the affects of those backups is reflected in the model. It includes pedestrian activity. It take into explicit account the percentage of trucks and other heavy vehicles. It takes into account a lot of factors that the critical lane volume technique does not take into account.

This analysis examined the impact upon vehicular and pedestrian traffic at seven intersections in the vicinity of the proposed development, as well as driveways in the stretch of Bethesda between Wisconsin and Arlington Boulevard. Mr. Wells referenced his traffic analysis report (Exhibit 38(g), p. 66, ¶5), in which he concluded, “The programmed and planned pedestrian/bicycle improvements would

¹⁵ The transcript repeatedly refers to the word “queue” as “cue,” the correct spelling for a different word. The Hearing Examiner has substituted the correct spelling for “queue” throughout the quote.

result in longer motorist delays and vehicle queues.” He also noted there (p. 66, ¶4) that the Synchro/Sim analysis “demonstrates the trade-off between (1) pedestrian and bicycle safety and convenience and (2) vehicle delays and queues.”

Mr. Wells suggests that there is a need to take action to mitigate the traffic congestion anticipated from the project. Such steps might include changes in traffic signal timing, and revising the way traffic moves into and out of the garage driveways, for example limiting turns to right-turn-in and right-turn-out. All this would be considered in cooperation with DPW&T and Technical Staff.

Mr. Wells further testified that, in his opinion, the access points to the proposed project will, in fact, be safe, adequate and efficient. With regard to safety of the Woodmont-Bethesda intersection, the geometric changes that are proposed will make existing conditions safer by reducing the pedestrian crossing distances and by reducing the steep angle from 45 degrees to 55 degrees, more or less. It will be more of a regular intersection.

With regard to efficiency, Mr. Wells testified that the streets and sidewalks “will operate in the fashion that is typical of most other vibrant successful central business districts.” He believes that “we’re very close to finding the appropriate balance between pedestrian concerns, vehicular concerns, public transportation, private automobiles, service and emergency vehicles.” He noted that the proposed driveways to the garage are located as far as practicable from the Woodmont- Bethesda intersection.

Mr. Wells opined that the internal design of the garage is adequate and efficient, in that the single point of revenue control has an advantage for “way-finding” and directional signage. There will be adequate stacking and queuing capacity inside the garage, and the placement of the garage driveways and modifications to Woodmont Avenue at Leland Street and Miller Avenue will minimize any adverse traffic impacts on the surrounding community. Therefore, in Mr. Wells’ opinion, the

proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate and efficient.

Mr. Wells also addressed the concern raised by Ourisman Honda that they need a nearby location to off-load their vehicles. He noted that the Development Plan calls for 110 foot long indents on both sides of Woodmont Avenue, south of Bethesda Avenue. Mr. Wells testified that 110 feet is long enough for the longest truck, but the decision is up to the County, not the Applicant, as to whether Ourisman will be given permission to use the public right-of-way for unloading their trucks.

Mr. Wells concluded that the proposed project and the access points will achieve an appropriate balance of safety, convenience and amenity for the residents of the development and neighboring areas. He added that, in his opinion, the proposed project is in the public interest.

B. Community Witnesses

1. Martin Hutt (Tr. 35-36):

Martin Hutt, Esquire, appeared on behalf of the Seasons, LLC and the Landows, who own the “Seasons” building, adjacent to the subject site. He stated that his clients had reached agreement with the Applicant, which is reflected in the binding elements that have been proffered and in Exhibit 56. It also calls for a reduction of the proposed loading dock near the Seasons from a double-wide to a single-wide facility. He concluded by stating that “the Season's, LLC no longer has any opposition to G-850 and its amended development plan and binding elements.”

2. William Deyhle (Tr. 37-47)):

William Deyhle testified that he is the managing partner of Ourisman Honda. He stated, “The point of this presentation or statement is to highlight for decision makers the critical need we have for off loading Honda vehicles and Honda parts, supplies for our customer service business. . . . Our need to continue this is critical to our business.”

Mr. Deyhle suggested that continuation of this process could be accommodated by a variety of means, including but not limited to long sidewalk curb indents constructed by Stonebridge/Hoffman on both sides of Woodmont Avenue. During weekdays, trucks and trailers could pull into these areas to off-load their merchant supplies. In the evenings and on weekends, these areas could be used by parents to safely drop off and pick up their children or for parallel paid parking.

Mr. Deyhle urged that another important reason to construct these indented curb off-loading areas is to provide additional relief from the commercial congestion which will be caused by narrowing Bethesda Avenue in front of Barnes & Noble and Ourisman Honda. While the traffic quieting will provide appreciated pedestrian safety, it will create the need to relocate the current Bethesda Avenue commercial off-loading, and the long indents situated along both sides of Woodmont Avenue need to be considered for this purpose.

On cross-examination, Mr. Deyhle admitted that his testimony relates to the ability for Ourisman Honda to have some private uses within the public right-of-way, so what he was, in effect, asking is that Applicant cooperate with Ourisman and the County to see if an acceptable arrangement can be worked out as to loading and unloading within the new public right-of-way.

When pressed by the Hearing Examiner as to Ourisman's position regarding the re-zoning application, Mr. Deyhle responded, "We are all for the development of Lot 31. We have no objections to the development of Lot 31 or 31A. . . . We are opposed to the project if there is no effort made to work with us and the County in providing a way for us to off load our supplies." He later added, "We do not object to the project going forward. I guess that's what I need to make clear. But we, I guess, at a later stage, I guess I'm saying we want to be on record is that, in a later stage when it does come to the actual development and restructuring Woodmont Avenue, we would want to be pretty deeply involved in that."

[Applicant's counsel then responded, that "this is really not the applicant's issue. The applicant has no control over permission granted or not granted by the County as to private use within its public rights of way." In support of this statement, he introduced a copy of County Code Section 49-11 (Exhibit 57).] Mr. Deyhle replied that he had had many dealings with the county, "and I truly believe that if the road is not redesigned with indents . . . , I will doubt seriously that the County would give us any privilege to unload vehicles . . . [;] right now it's allowed because Woodmont is such a wide road. They can still get two lanes of traffic by with unloading going on. If the road is built without indents that are not in the plan or suggested or recommended by someone, then we effectively will be left out [, and] . . . will not have an area to off load vehicles legally."

C. Government Witnesses

1. Elizabeth Bradford Davison (Tr. 24-34):

Elizabeth Davison testified in support of the application, as the Director of the Department of Housing and Community Affairs (DHCA). She stated that DHCA has been working very closely with the DPW&T and the Parking Lot District on this project over the past several years. One of the key elements she emphasized was the addition of affordable housing, which is a recommendation in the Master Plan, and is part of the proposal. Other goals were compatibility with the Sacks neighborhood, preservation or enhancement of the Capital Crescent Trail, and development of a vibrant urban development that adds to the lively mix in downtown Bethesda.

In terms of the affordable housing, this project would include not only MPDUs, but also workforce housing units, priced and available to people whose incomes are a little bit above the MPDU level (up to 120 percent of area median income). Ms. Davison added that this housing environment would be very desirable in an area such as downtown Bethesda, where there are very few units available to a group in that income range. Given that Bethesda is a major employment center

with jobs at virtually every level of income, DHCA felt it was a very important area to include affordable and moderate income housing.

Over and above the MPDUs and the workforce housing, the developer is also making a contribution of over two million dollars to promote the affordable housing. DHCA is working with the developer to draft a memorandum of understanding that will specify not only the price and income levels for the affordable housing, but also the exact way the cash contributions will be used, possibly reducing condominium fees or reducing prices.

Ms. Davison further testified that the selection committee looked at 13 different proposals for this site, and the subject proposal met the goals she highlighted better than others had.

Ms. Davison indicated that the proposal for additional height for the project was unanimously approved by the “alternative review committee” (ARC), on which she served, based on input from an economic consultant who looked at the materials that were provided by the applicant. The committee found that the additional height was appropriate because of the financial infeasibility of the project without that additional height.

[The Hearing Examiner raised the issue of whether participation of County officials in the ARC process constituted a possible conflict of interest because the County owns the subject site and contracted with Applicant to manage rezoning and construction, which includes building a County garage. Tr. 28-34.] Ms. Davison testified that in another zoning case (G-842/DPA 06-2), in which she had an even more direct interest since her agency owned the land being developed, she had asked the County Attorney’s office about the possibility of a conflict and had received a go-ahead by e-mail. No formal written opinion was issued. [The Hearing Examiner mentioned that, because the statute requires participation of the County officials in the ARC, the “rule of necessity” allows their participation.]

Ms. Davison further testified about the methodology used by the ARC for reviewing financial feasibility. The ARC asks for a submission from the applicant as to the project's financial feasibility with the increased height and without. The ARC then has the submission evaluated by an outside expert, a professional in the field who is up to date on issues such as construction costs, condominium fees, soft costs, market pricing, county regulations regarding MPDUs and workforce housing, and any other relevant elements. The outside expert, in most cases, will have a dialogue with the applicant, ask a number of questions, and perhaps ask for additional detail and back up studies that might have been done to make sure that the numbers are within the norms of the market at this point.

Ms. Davison added that the closer you get to actual construction, things solidify and become better known. At the early stage of the ARC review, the expert looks at whether the applicant's numbers appear to be accurate, whether the mathematics is done properly, and whether the applicant would be likely to be able to get financing based on the rates of return shown in the alternatives. The ARC then discusses the expert's evaluation with the expert, and in some cases, asks for further analysis, as was done in this case. Ultimately, the ARC makes a finding as to the economic feasibility of the project without the additional height, which is what the alternative review committee is supposed to evaluate.

2. William Frederick Siebert III (Tr. 47-62):

William Frederick (Rick) Siebert III testified that he is Chief of the Parking Operations Section, Division of Operations, Department of Public Works and Transportation. According to Mr. Siebert, the Planning Board "unanimously supported" the mandatory referral application. Regarding the joint public-private mixed-use redevelopment project¹⁶ Tr. 60

¹⁶ The public-private joint development includes the public/private parking garage, the realignment of Woodmont Avenue and the private mixed-use project.

Mr. Siebert asserted that the County has had a longstanding need for a public parking garage at this site because there is a “deficit of public parking” in the area. Mr. Siebert also mentioned that the public/private joint development of parking lots 31 and 31A will achieve public policy objectives by providing workforce and affordable housing where it is sorely needed. He characterized the project as “smart growth,” given its proximity to the Bethesda Metro station. Mr. Siebert indicated that the County has engaged in an extended community outreach concerning a potential project at this site for many years and that community considerations were incorporated into every stage of this development effort, including during the design process of the public parking garage. In his opinion, this public-private joint development meets the objectives identified above.

According to Mr. Siebert, the planned garage will be a four and a half level underground structure, stretching over the entire 3.3 acre subject site (*i.e.* under Lot 31, Woodmont Avenue and Lot 31A). It will have a total of 1480 spaces, 1138 public and 342 private. Pedestrian access to and from the garage is provided at three separate locations. This makes it easy to access the retail space, the Capital Crescent Trail, and Woodmont and Bethesda Avenues, for those walking to these nearby areas. The design provides a single point of revenue control, which simplifies “way-finding,” lowers costs and creates space efficiency, according to Mr. Siebert. The single point of revenue control is located a considerable distance from the street entrances and exits, in order to provide long internal vehicle stacking areas and to eliminate on-street stacking. The ramping system, in conjunction with the single revenue control point, makes it much easier for drivers to choose their exit lanes based on their destinations.

There are private elevator and stairwell areas that go directly to the private areas of the garage, and there are three public stairwells and elevator areas that access the public parts of the garage. Vehicular access to the garage will be from both Bethesda and Woodmont Avenues, and it will be shared by the public and private users. Private parking users will be permitted by the County to utilize

the public ramps, points of ingress, egress and other public features of the garage. They will share the entrance and exit system, and they will share the common single control point. The private parking will be “nested” on three floors of the garage, along Bethesda Avenue.

Construction of the garage will take 18 to 24 months, “once the shovel goes in the ground.” Its actual usage may be delayed beyond that because the designers made a decision to exhaust the ventilation system through the roof of the Lot 31 building to avoid any adverse impact on the adjoining neighborhood or on pedestrians in the area.

As to the plans to move Woodmont Avenue, Mr. Siebert testified that “The realignment of Woodmont Avenue is a key component of the County's ability to achieve all the public policy objectives of the RFP.” He set forth four reasons (Tr. 50-51):

First, and significantly, the alignment of Woodmont improves pedestrian safety at an intersection that has been identified as problematic. It squares off an intersection that is currently offset with unusually wide pedestrian crossings. The realignment dramatically reduces the pedestrian crossing distances, resulting in substantially safer pedestrian experience.

Second and equally important, the realignment of Woodmont allows a garage design that locates vehicular access as far as possible from the intersection of Woodmont and Bethesda Avenues. This minimizes vehicular conflicts and makes for a more efficient intersection.

Third, [it] allows for a very efficient garage design, which internally minimizes vehicular and pedestrian conflicts, maximizes parking spaces and saves costs. . . .

It lastly optimizes the development potential of Lots 31 and 31A taken as a whole.” ”

Finally, Mr. Siebert testified that he will work with Ourisman Honda to find satisfactory approach to offloading their vehicles. Tr. 58.

D. People's Counsel

Martin Klauber, the People's Counsel, expressed his support for the project at the hearing. Tr. 225-231. He noted that there was clearly a need for additional public parking, and “if a deficit of public

parking continues unabated, pretty soon people are going to get tired. And they're not going to come here.” Mr. Klauber emphasized the need for MPDUs, and found it “wonderful” that the project would supply both MPDUs and workforce housing. He added that the two million dollar donation by the applicant is going to help the mechanics of both of the MPDU and workforce housing processes, resulting in the availability of living units that would not otherwise be available had it not been for this application.

Mr. Klauber also praised the intersection improvements at Woodmont and Bethesda Avenues. He felt that the realignment will help residents and “walkability,” and, “hopefully, if that intersection works better, then you won't have people crossing mid block,” which would reduce pedestrian deaths. The intersection improvement will also provide a better parking garage design.

Mr. Klauber noted that Applicant had satisfied the very specific urban design guidelines for Lot 31, and had protected the Sacks community from having an above-ground garage nearby, which they feared. Instead, there will be a 50 foot setback, and they will see bicycle riders and a townhouse facade.

Mr. Klauber did indicate that he was highly concerned about the planned redistribution of traffic set forth in Mr. Wells’ traffic operations analysis because it affects a lot of people in Bethesda. Mr. Klauber plans to take a very active and specific role in the traffic operations analysis. It is “an extremely important feature,” but it is not done at zoning. He emphasized that a very careful balancing is going to have to occur. “But for today and this afternoon, and for the County Council and this application, I certainly do recommend that it be approved as requested by the applicant and as contained in the record of this case.”

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Standards for Council Review

Section 59-D-1.61 of the Zoning Ordinance requires the District Council, before it approves any application for reclassification to the TS-M Zone, to consider whether the application, including the development plan, fulfils the “purposes and requirements” set forth in Code Section 59-C for the new zone. In making this determination, the law expressly requires the District Council to make five specific findings, “in addition to any other findings which may be necessary and appropriate to the evaluation of the proposed reclassification.” Therefore, these findings are an essential part of the Hearing Examiner’s Report and Recommendation.

The five specific findings required by §59-D-1.61 of the Zoning Ordinance are:

(a) *[That t]he zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies.*¹⁷

(b) *That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.*

¹⁷ A recent amendment to the Zoning Ordinance added the following “ARC” procedure to Finding (a):
However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if a majority of an Alternative Review Committee composed of the Director of the Department of Housing and Community Affairs, the Executive Director of the Housing Opportunities Commission, and the Director of Park and Planning, or their respective designees, find that a development that includes all required MPDUs on site, including any bonus density units, would not be financially feasible within the constraints of any applicable density or height limit. If the Committee finds that the development would not be financially feasible, the Planning Board must recommend to the District Council which if any of the following measures authorized by Chapter 59 or Chapter 50 should be approved to assure the construction of all required MPDUs on site:

- (1) exceeding an applicable height limit, lower than the maximum height in the zone, that was recommended in a master plan or sector plan,*
- (2) exceeding an applicable residential density limit, lower than the maximum density in the zone, that was recommended in a master plan or sector plan, or*
- (3) locating any required public use space off-site.*

(c) *That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.*

(d) *That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.*

(e) *That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

Because the general requirement of the law – that the application must fulfill the “purposes and requirements” of the new zone – is subsumed in the language of the five specific required findings (especially in subsection (b)), a determination that the five findings have been satisfied would satisfy the Montgomery County Zoning Ordinance. However, in addition to these five findings, Maryland law also requires that the proposed rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

In sum, there are six findings required (§59-D-1.61(a) through (e) and the public interest). The “Required Findings” in the next part of this report are organized in the order set forth in the statute to facilitate review.

B. Required Findings

1. County Plans and Policies

The first required finding is that:

The zone applied for substantially complies with the use and density indicated by the master plan or sector plan, and does not conflict with the general plan, the county capital improvements program, or other applicable county plans and policies. . . . [The remainder of this provision permits a project to exceed the height and density recommendations of a Sector Plan if an Alternative Review Committee (ARC) finds that it is not “financially feasible” to meet those recommendations because of the inclusion of MPDUs in the project. In such a case, the Planning Board may recommend permitting a height and density greater than recommended in the Sector Plan.]

a. The Applicable Master Plan or Sector Plan

The subject site is located within the area governed by the *Bethesda Central Business District (CBD) Sector Plan*, approved and adopted in July, 1994. More specifically, Lot 31 is within the Arlington Road District and Lot 31A is in the Wisconsin South Corridor. This distinction accounts for the different zoning recommendations contained in the Sector Plan with regard to the subject site. Lot 31 is recommended for the TS-M Zone that is sought by Applicant, but Lot 31A is recommended for its current CBD-1 classification, with its use anticipated as public parking. *Sector Plan, p. 125, Figure 4.34.*

Nevertheless, the Hearing Examiner agrees with Applicant that the Sector Plan did not envision that the Lot 31A portion of the subject site would be combined with Lot 31 as a single development project, with the Public Parking Garage expanding beneath the entire site. Both the ARC and the Planning Board recommended approval of the additional height requested for the Lot 31A building, and the zoning recommendation has been superceded by the language of Zoning Ordinance §59-C-8.21(a), which permits the TS-M Zone within the CBD when an adjacent lot, or one separated only by a public right-of-way, is eligible for classification to the TS-M Zone. That is precisely the case here.

As such, the Sector Plan should be interpreted to give effect to its underlying intent for the area, and not strictly in accordance with its height recommendation or its CBD-1 recommendation for Lot 31A. A master plan is only a guide where, as here, the Zoning Ordinance does not make it mandatory. *See Richmarr Holly Hills, Inc. v. American PCS, L.P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). In this case, the additional 15 feet of height sought by Applicant for the Lot 31A building (*i.e.*, permitting it to be 90 feet high) will actually make it more compatible with the adjacent Seasons building and the confronting Artery Plaza building, both of which exceed 140 feet in height. Tr. 146. Reclassification of the entire site to a single zone, the TS-M Zone, is permitted by the current Zoning Ordinance and makes sense in this instance.

The issue of compliance with the Sector Plan was discussed at length in Part III.D.5. of this report (pp. 36-42). As outlined therein, Applicant's proposal is fully consistent with the recommendations and urban design guidelines specified for Lot 31, and though not consistent with the zoning and height recommendations for Lot 31A, those recommendations should not be dispositive in this case. The Hearing Examiner finds that the proposed development is consistent with the goals and objectives of the Bethesda CBD Sector Plan, and is thus in substantial compliance with the Sector Plan.

b. The General Plan and the County Capital Improvements Program

The General Plan "encourages housing plans that foster transit serviceability and proximity of affordable housing to transit." General Plan Refinement, Approved and Adopted 1993, p. 53. This Application would place 250 housing units, including MPDUs and WFDUs, about 1500 feet from a Metro Station, thus satisfying that aspect of the General Plan.¹⁸ Applicant's transportation planner, Martin Wells, testified that the mixed-use private project is not dependent upon the County's Capital Improvements Program. Tr. 214. Of course, the planned public garage and some of the planned street

¹⁸ It also may be very close to a "Purple Line" transit stop, if that project is ever constructed. Tr. 104 and 219. Transportation Planning Staff noted that "the property across from Lot 31" is being considered as the terminus for the proposed Bi-county Transitway (BCT). Exhibit 43, Attachment 1, p. 8.

improvements are dependent upon public funds. In this connection, the Woodmont Avenue ROW abandonment has been reviewed and approved by the Council (Part III.D.4 of this report), and the planned public garage and private use of Lots 31 and 31A have been approved by the Planning Board in a “mandatory referral” (Part III.D.3. of this report). The Hearing Examiner finds, based on all the evidence, that the proposed development is consistent with County policies.

c. Other County Policies (Annual Growth Policy and Adequate Public Facilities Ordinance)

Under the County’s Adequate Public Facilities Ordinance (“APFO,” Code §50-35(k)), the Planning Board has the responsibility, when it reviews a preliminary plan of subdivision, to assess whether the following public facilities will be adequate to support a proposed development: transportation, schools, water and sewage facilities, and police, fire and health services. The Planning Board’s application of the APFO is limited by parameters that the County Council sets each year in the Annual Growth Policy (“AGP”) and biennially in the two-year AGP Policy Element. While the ultimate test under the APFO is carried out at subdivision review, evidence concerning adequacy of public facilities is relevant to the District Council’s determination in a rezoning case as to whether the reclassification would serve the public interest.

Under the 2003-05 AGP Policy Element (p.14), which remained unchanged in FY 2006, “[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” There is no such evidence in this case. We therefore turn to the remaining three public facilities, transportation, schools and water and sewer service.

1. Transportation

Under the 2003-05 AGP Policy Element, subdivision applications are subject to Local Area Transportation Review (“LATR”) requirements. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion during the peak

hour of the morning and evening peak periods. Congestion is defined by the County in terms of “critical lane volume” (CLV) above specified limits. The CLV standard for the relevant intersections in this case is 1800.

It is clear from Mr. Wells’ CLV analysis that the proposed project and the garage will meet current County CLV standards; however, as mentioned elsewhere in this report, Mr. Wells’ “Synchro/Sim” traffic analysis (the third part of the LATR traffic study) demonstrates that “The programmed and planned pedestrian/bicycle improvements would result in longer motorist delays and vehicle queues,” and that there is a “trade-off between (1) pedestrian and bicycle safety and convenience and (2) vehicle delays and queues.” Exhibit 38(g), p. 66. The planners will have to wrestle with these trade-offs at subdivision and site plan review. Various traffic mitigation measures are being considered, including restricted turning movements, additional turn lanes, changes in traffic signal timing, and revising the proposed “neck downs” of the traffic lanes. Technical Staff Report, Exhibit 43, p. 17.

As explained more fully in Part III.D.6.a. of this report (pp. 42-46), the Hearing Examiner finds that Applicant’s proposal complies with the LATR standards and other transportation requirements. Based on the undisputed evidence, the Hearing Examiner finds that transportation facilities will be adequate for this project and that access and circulation will be safe, adequate and efficient for both vehicular and pedestrian traffic.

2. School Capacity:

This property is located within the Bethesda Elementary School, Westland Middle School and Bethesda-Chevy Chase High School service areas. Bruce H. Crispell, Director of the Division of Long-range Planning, Montgomery County Public School’s (MCPS), estimated that the impact of this project would be approximately twenty (20) elementary, ten (10) middle and eleven (11) high school students. Attachment 4 to Exhibit 43. According to Mr. Crispell and Technical Staff, the current

Growth Policy schools test finds capacity adequate in the Bethesda/Chevy Chase cluster. As explained more fully in Part III.D.6.b. of this report (pp. 46-47), the Hearing Examiner concludes that MCPS will be able to handle the increased demand projected from the subject development.

3. Water and Sewer Service:

Under the FY 2003-05 AGP Policy Element, p.14, “applications must be considered adequately served by water and sewerage if the subdivision is located in an area in which water and sewer service is presently available, is under construction, is designated by the County Council for extension of service within the first two years of a current approved Comprehensive Water Supply and Sewerage Systems Plan (*i.e.*, categories I, II, and III).”

According to Frank Bossong, Applicant’s expert in civil engineering (Tr. 169-187), the subject site is served by public water and sewer systems, and is currently in Water Service Category W-1 and Sewer Service Category S-1. Water and sewer service capacity appears to be adequate, as are the gas supply and electric power. Technical Staff confirms the S-1 and W-1 service categories. As stated by Technical Staff, “The public facilities are adequate to serve the proposed development . . .” Exhibit 43, p. 6. The Hearing Examiner so finds.

In sum, based on this record, the Hearing Examiner finds that the requested rezoning does not conflict with “other applicable County plans and policies.”

2. Zone Requirements, Safety, Convenience and Amenity of Residents and Compatibility with Adjacent Development

The second required finding is:

That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.

a. Compliance with Zone Purposes, Standards and Regulations

The requirements for the TS-M Zone are found in Code §59-C-8. The TS-M Zone is a “floating zone,” intended to be used in transit station development areas and within the CBD when an adjacent lot, or one separated only by a public right-of-way, is eligible for classification to the TS-M Zone. Section 59-C-8.21(c) also specifies that the TS-M Zone is intended for locations where substantial commercial or office uses already exist or where such uses are recommended by an approved and adopted master plan. As discussed in Parts III.B, C and D of the report, that is the case here.

Section 59-C-8.21(d) provides:

In order to facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses, some of the specific restrictions which regulate, in some other zoning categories, the height, bulk and arrangement of buildings and the location of the various land uses are eliminated and the requirement substituted that all development be in accordance with a plan of development meeting the requirements of this division.

Applicant’s development plan is discussed at length in Parts III.D.1 and 2 of this report (pp. 13-26).

The Hearing Examiner finds the development plan to be consistent with the requirements of the Zoning Ordinance.

The purposes of the TS-M Zone are set forth in Code §59-C-8.23:

(a) *To promote the optimum use of the transit facilities by assuring the orderly development of land in transit station development areas and access, both vehicular and pedestrian, to metro stations;*

(b) *To provide for the needs of the workers and residents of transit station development areas;*

(c) *To provide for the incidental shopping needs of the transit facility riders at metro stations having parking facilities for large numbers of riders;*

(d) *To minimize the necessity for automobile transportation by providing, in largely residential transit station areas, the retail commercial uses and professional services that contribute to the self-sufficiency of the community;*

(e) *To obtain amenities for the residents and workers in transit station areas not ordinarily obtainable in conventional zoning classifications; and*

(f) To prevent detrimental effects to the use or development of adjacent properties of the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the county as a whole.

Applicant's urban planner, Douglas Wrenn, testified that the proposed rezoning and the development plan conform to the six purposes of the TS-M zone, as specified in the Zoning Ordinance. Tr. 124-154. As stated by Mr. Wrenn, the proposed development meets the first purpose by providing for a public parking garage and connectivity to the Bethesda Metro Station, which is only 1500 feet away, and to the other transit facilities located in this district that will help optimize the use of transit for the residents and visitors to this portion of Bethesda. The development would fulfill the second purpose by the inclusion of mixed income and mixed height of residential uses, and by the creation of the street retail and an improved pedestrian circulation environment.

The main street retail that is proposed here, completing Bethesda Row, will accomplish the third purpose of providing for incidental shopping needs of transit facility riders. The fourth purpose is to minimize the necessity of the automobile. Mixed-use developments such as the subject one require less reliance on the automobile for services and amenities. Easy access to the Bethesda Metro will also help meet that purpose.

The fifth purpose is to obtain amenities not available in conventional zoning. Conventional zoning does not allow the flexibility that is required to provide the amenities that are being proposed here, such as the enhancements to the Capital Crescent Trail, the additional landscaping, the drop off for the users of the trail, and streetscape amenities. The proposed development would satisfy the final purpose of preventing detrimental affects upon the adjacent properties by providing a perfect transition from the more intensely developed portions of Bethesda to the less intensely developed areas to the south, such as the Sacks neighborhood.

The proposed development will put 250 residential units within easy walking distance of a Metro station, and will include MPDUs as well as workforce housing. It will provide 40,000 square feet of retail space and improvements to the sidewalks and crosswalks to encourage walking and the use of the transit by future employees and residents. Streetscape, bikeway improvements and adjacent retail space will reduce the dependence on the automobile in the area. Based on the ample evidence in the record, the Hearing Examiner finds, as did Technical Staff and the Planning Board, that the proposed development satisfies the purposes of the TS-M Zone.

Zoning Ordinance §59-C-8.23 specifies the uses permitted in the TS-M Zone. All of the uses proposed for the Mixed-Use Project (residential and retail) are permitted in the TS-M zone.

Zoning Ordinance §59-C-8.24 provides that the TS-M Zone is “permitted only in a Transit Station Development Area defined in section 59-A-2.1 and in accordance with an approved and adopted master plan or sector plan, except in areas within and adjacent to a Central Business District in accordance with Section 59-C-8.21(a).” Lot 31 is within a Transit Station Development Area as defined in Section 59-A-2.1, while Lot 31A is within the Central Business District, and is permitted pursuant to Section 59-C-8.21(a), as described above.

Zoning Ordinance §59-C-8.25 requires that a proposed development in the TS-M Zone conform to “the facilities and amenities” of the Sector Plan, include any required easements, provide for safe and efficient circulation and adequate open and recreation space, and insure compatibility with the surrounding area, as well as the ability of the area to accommodate the intended use.

The Sector Plan does not include any specific recommendations regarding amenities, facilities, easements or dedications. The proposed development would provide a realignment of Woodmont Avenue to permit optimal use of Lot 31A and to improve pedestrian circulation. It also will provide a bicycle drop-off area, connected to the Capital Crescent Trail by a new bike path and sidewalk, a variety

of streetscape improvements and a total of at least 35% open space, including a minimum of 10% public use space and 25% active and passive recreational space. The realignment of Woodmont would result in dedication of the new ROW to the County, once its precise contours have been established. Tr. 68 and 184. The safety and efficiency of the circulation, as well as the compatibility with the surrounding area will be discussed below in connection with specific findings required of the Council.

The remaining requirements of the TS-M Zone are spelled out in Code Section 59-C-8.4, which prescribes development standards. Those standards are set forth below in a chart from page 13 of the Technical Staff report (Exhibit 43),¹⁹ juxtaposed against what Applicant will be providing:

Comparison of Development Standards of the TS-M Zone

Items	Required/Allowed	Proposed
Lot Area	40,000 SF Minimum	133,738 SF Net Lot Area (3.07 acres) 143,819 SF Gross Area (3.30 acres)
Floor Area Ratio	3.0 FAR	2.59 FAR
Land Uses		
- Residential Total	NA	332,500 SF (250 DUs, Max.)
- MPDUs on-site	12.5%	12.5% (32 Max.)
- Work force housing	NA	35 Max
- Retail	NA	40,000 SF Max.
- Total	431,457 SF Max.	372,500 SF (2.59 FAR X Gross Tract)
Building Height	NA	65' Max. in Lot 31 Building 90' Max. in Lot 31A Building*
Open Space:		
- Public Use Space	10% (13,378 SF)	10% (13,378 SF Min.)
- Active and Passive Recreation	25% (33,435 SF)	25% (33,435 SF Min.)
- Total	35% (46,813 SF)	35% (46,813 SF Min.)
Parking Spaces:		
- Private Parking	Not specified	342 spaces
- Public Parking	N/A	1138 spaces

Note: *75 feet recommended in the Sector Plan for Lot 31A; 90 feet allowed with additional, affordable housing, per recommendation of ARC and Planning Board.

¹⁹ The Hearing Examiner has modified some entries in the chart for clarity.

As is evident from the chart, Applicant has met all the applicable development standards. The Hearing Examiner finds that Applicant's development plans are in accordance with all of the purposes, standards and regulations of the TS-M Zone, as set forth in Article 59-C of the Code.

b. Safety, Convenience and Amenity of Residents

The next part of "Finding (b)" required by Section 59-D-1.61 is a determination that the proposed development would provide the "maximum safety, convenience, and amenity of the residents." This issue has been discussed above in conjunction with the requirements for the TS-M Zone. The Hearing Examiner finds that Applicant has provided the maximum in safety, convenience and amenities for the future residents of this development.

c. Compatibility with Adjacent Development

The final required determination under "Finding (b)" is that the proposed development be compatible with adjacent development. The issue of compatibility was touched upon in Parts III.D.1 and 5 of this report in connection with the Applicant's "vision" for the development and Sector Plan compliance.

One of Applicant's representatives, Lamont Hoffman, testified (Tr. 89-90) that because there is a mix of uses completely surrounding the subject property, Applicant decided to make this project a "four sided building," which attempts to face each use in its appropriate way for the purpose of compatibility. The bike drop-off, which is to the south and east of the property, links to the Capital Crescent Trail and provides the needed buffer to help protect the single-family homes to the south. The south and west corner of the site employs a townhouse style construction intended to bring the massing down to a more human scale, more compatible with the single-family homes in the Sacks community immediately to the south. These two-story townhouse style condominiums also turn towards the Capital Crescent Trail to make that a more pleasant experience for those utilizing the trail.

There is also a courtyard in the center of the building to break up the townhouse row along that south perimeter, and to open it up light and air. The bicycle drop-off area, which is at the southeastern corner of the site, links to the bicycle trail that is in front of the townhouses. Looking south from Bethesda Avenue, along Woodmont Avenue, Applicant wants the proposed buildings “to form a sort of arc that embraces this intersection,” without overwhelming it.

On the east side of Woodmont, new setbacks from the Seasons building were agreed to in order to make the buildings more compatible. The 90 foot tall building, which is proposed, with a step down to 65 feet on the western side, would be more compatible with the existing structures to the east and north, and with the building planned for Lot 31 across Woodmont Avenue. Applicant’s efforts were to vary the view of each side of the proposed buildings to be compatible with surroundings, and yet relate to each other. Applicant’s urban planner, Douglas Wrenn, concluded that the proposed development would be compatible with adjacent development and land uses. Tr. 153.

Technical Staff also found the proposed development to be compatible with the existing and proposed adjacent development. Staff noted that the Lot 31 building will be limited to three to five stories (65 feet maximum), and that the three-story multi-family units are located along the southern property line adjacent to the existing single-family dwelling units. In addition, a setback of 50 feet will be provided, and a large green space extending into the project will be provided adjacent to the existing development. These features all help to make the development compatible with the nearby residences. The building will step up to five stories along Bethesda Avenue and Woodmont, consistent with nearby buildings.

As to the Lot 31A building, Technical Staff noted that its planned 90 foot height would be compatible with the adjacent high-rise residential building (the Seasons), which is approximately 143 feet in height. Moreover, the step down from 90 feet for the east side of the proposed Lot 31A building to 65 feet on the Woodmont Avenue side of the building will make it compatible with the Lot

31 building to be located west of Woodmont Avenue. The increased setbacks for the Lot 31A building from its neighbor to the east, as specified in the Binding Elements, will also increase compatibility by allowing more space between the two buildings and avoiding a “canyon effect.”

For all these reasons, the Hearing Examiner finds Applicant’s Development Plan to be compatible with adjacent development.

3. Internal Vehicular and Pedestrian Circulation Systems and Site Access

The third required finding is:

That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

As discussed in Parts III.D.4 and 6.a. of this report (pp. 30-36; 42-46), and reviewed above in Part V.B.1.c. (pp. 83-84), the balance between vehicular and pedestrian circulation systems for this project is a work in progress which will not be completed until the final alignment and configuration of Woodmont Avenue is decided upon at subdivision and site plan. Reaching the correct balance is critical to the public interest, but it is not something that can be decided at the rezoning stage.

Transportation Planning Staff made it clear in its report (Exhibit 43, Attachment 1, pp. 4-6) that it continues to review the matter and the possibility of various traffic mitigation measures.

Applicant’s transportation expert, Martin Wells, testified (*Tr. 188-218*) that, in his opinion, the access points to the proposed project will, in fact, be safe, adequate and efficient. With regard to safety of the Woodmont-Bethesda intersection, Mr. Wells opined that the geometric changes that are proposed will make existing conditions safer by reducing the pedestrian crossing distances and by reducing the steep angle from 45 degrees to 55 degrees, more or less. It will be more of a regular intersection.

With regard to efficiency, Mr. Wells testified that the streets and sidewalks “will operate in the fashion that is typical of most other vibrant successful central business districts.” He believes that

“we're very close to finding the appropriate balance between pedestrian concerns, vehicular concerns, public transportation, private automobiles, service and emergency vehicles.” He noted that the proposed driveways to the garage are located as far as practicable from the Woodmont-Bethesda intersection.

Mr. Wells opined that the internal design of the garage is adequate and efficient, in that the single point of revenue control has an advantage for “way-finding” and directional signage. There will be adequate stacking and queuing capacity inside the garage, and the placement of the garage driveways, and the modifications to Woodmont Avenue at Leland Street and Miller Avenue, will minimize any adverse traffic impacts on the surrounding community. Therefore, in Mr. Wells’ opinion, the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate and efficient.

Based on the entire record, the Hearing Examiner finds that external access and internal circulation will be safe, adequate and efficient for both vehicular and pedestrian traffic.

4. Preventing Erosion, Preserving Vegetation, Forest Conservation and Water Resources

The fourth required finding is:

That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

As discussed in Part III.D.7 of this report (pp. 48-50), no environmental issues were raised in this case. Technical Staff noted that the site is not located in a Special Protection Area or Primary Management Area. It has no steep slopes, or erodible soils, and there are no wetlands or streams on

the site. Exhibit 43, p.17. One-half acre of afforestation will be is needed to meet the requirements of the Forest Conservation Law. Technical Staff states that “[a] combination of street trees in the public right-of-way and additional landscaping in the setback area from the existing neighborhood will meet the requirement.” Exhibit 43, p. 18.

An approved stormwater management plan is required at the time of the approval of the Preliminary Plan. Applicant’s engineer, Frank Bossong, IV, testified that currently there are no storm water management facilities on either Lot 31 or 31A, or within the Woodmont Avenue or Bethesda Avenue rights-of-way. Applicant proposes to provide a hydrodynamic facility along Woodmont Avenue, and within the first level of the garage there will be two storm filter facilities that will use a cartridge filtration system to clean the water and discharge it back into the receiving or existing storm drain lines.

Applicant is requesting a waiver of channel protection volume controls based on the fact that the project will actually reduce the amount of imperviousness. The existing site is approximately 95 to 100 percent impervious right now. Applicant plans to reduce that by about 30 percent, to a level of approximately 70 percent imperviousness. Mr. Bossong described this as “a positive impact” because the reduction in imperviousness will reduce the flow off the property to less than exists today, and the water quality facilities will produce cleaner water runoff.

According to Mr. Bossong, sediment control takes care of itself on this type of project since a large hole is being created which will hold the sediment. There will also be some perimeter measures around the edge, to protect the rights-of-way and the Sacks subdivision. There will be very little grading because the builders will be creating a hole for the garage and developing up from the garage to the residential component.

In sum, the Hearing Examiner finds that Applicant has demonstrated the environmental controls required by “Finding (d).”

5. Ownership and Perpetual Maintenance

The fifth required finding is:

That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.

Applicant, Lot 31 Associates, is the developer selected by the County in a competitive solicitation for proposals to develop the subject property, which is owned by the County. The County entered into an agreement with Applicant to have Lot 31 Associates serve as the County's agent for purpose of applying for and obtaining zoning and development approvals. A copy of that agreement is in the record as Exhibit 4.

Applicant's commitment to perpetual maintenance of all recreational and other common or quasi-public areas is established by General Note 19 on the Development Plan (Exhibit 66(a)); by Applicant's Statement in Support of the Application (Exhibit 15, Part V, p. 17), by the testimony of Douglas Firstenberg (Tr. 105-106), a representative of Lot 31 Associates, and by the July 5, 2006 letter to the Hearing Examiner from Applicant's attorney (Exhibit 62(b)). General Note 19 provides that "Land intended for public use but to remain in private ownership will be maintained in perpetuity for public use pursuant to agreement with the County." The Applicant's Statement, the Firstenberg testimony and the attorney's letter indicate that maintenance of the recreational and other common or quasi-public areas will be managed by a combination of the County, which is responsible for the public garage, rights-of-way and sidewalks, and the condominium entity which will be created as part of the overall land-and-building condominium structure. Condominium documents will specifically set forth perpetual maintenance requirements, and the County and the condominium entity may contract with the "Bethesda Urban Partnership" to physically conduct this maintenance.

The Hearing Examiner finds that Applicant has sufficiently demonstrated both ownership of the property and its commitment to perpetual maintenance of all recreational and other common or quasi-public areas.

6. The Public Interest

The applicant must show that the proposed reclassification is sufficiently in the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

The issue of Sector Plan conformance was considered in Parts III.D.5. and V.B.1.a of this report. As outlined therein, Applicant's proposal is fully consistent with the recommendations and urban design guidelines specified for Lot 31, and though not consistent with the zoning and height recommendations for Lot 31A, those recommendations should not be dispositive in this case. The Hearing Examiner finds that the proposed development is consistent with the goals and objectives of the Bethesda CBD Sector Plan, and is thus in substantial compliance with the Sector Plan.

The Planning Board and its Technical Staff supported the proposed rezoning. Technical Staff, in a report dated June 7, 2006, recommended approval of the application (Exhibit 43). The Planning Board considered the application on June 22, 2006 and, by a vote of 5 to 0, also recommended approval, as stated in a memorandum dated June 23, 2006 (Exhibit 45). In that same memorandum,

the Planning Board referenced the ARC recommendation, and observed that representatives of the County's Department of Housing and Community Affairs (DHCA) and its Department of Public Works and Transportation (DPW&T) had testified in support of the project. The Planning Board also noted that it had approved the related abandonment and mandatory referral "as a separate item."

The impact on public facilities was discussed in Part. III. D.6. of this report. The evidence indicates that, in general, transportation, schools and water and sewer services would not be adversely affected by the proposed development. However, there is a *caveat* – vehicular traffic will likely be slowed at the crucial intersection of Bethesda and Woodmont Avenue because of the efforts to make it more pedestrian friendly, and it will clearly be slowed during two years of construction because Woodmont Avenue south of Bethesda Avenue will be closed to vehicular traffic.

These are very important public interest concerns, but they cannot be resolved as part of this rezoning application. The Council has already approved the ROW abandonment for Woodmont Avenue and considered the construction impact at that time, passing a resolution that authorized the abandonment but required measures to minimize traffic disruptions during construction. *See* discussion in Part III. D. 4 of this report. The other traffic issue, the proper balance between pedestrian and vehicular traffic, will have to be resolved at subdivision and site plan. In any event, the record demonstrates that Technical Staff, the Planning Board and DPW&T are all acutely aware of the problem and will be working on it. We do know that the project will bring 1138 new public parking spaces to an area that sorely needs them, and will provide additional retail space and affordable housing to the downtown Bethesda area, all of which is in the public interest.

There has been much public support for, and virtually no opposition to, this project, as reflected in input from public interest groups and government officials. Part III.E. of this report (pp. 50 to 55) outlines the strong support for the proposed development from the Coalition for the Capital Crescent Trail and from the Sacks Neighborhood Association. Two County officials appeared at the public

hearing to express their support for the project, William Siebert III, Chief of the Parking Operations Section, Division of Operations, Department of Public Works and Transportation, and Elizabeth Bradford Davison, Director of the Department of Housing and Community Affairs. It should also be mentioned that Martin Klauber, the People's Counsel, expressed his support for the project at the hearing. Tr. 225-231. He noted that there was clearly a need for additional public parking, and he emphasized the benefits of the planned MPDUs and workforce housing.

For the reasons discussed at length in this report, the Hearing Examiner concludes that the proposed development would be in the public interest.

C. Conclusion

Based on the foregoing analysis, and after a thorough review of the entire record, I reach the following conclusions:

1. The proposed development satisfies the intent, purpose and standards of the TS-M Zone, and meets the requirements set forth in Section 59-D-1.61 of the Zoning Ordinance;
2. The application proposes a project that would be compatible with development in the surrounding area; and
3. The requested reclassification to the TS-M Zone has been shown to be in the public interest.

VI. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-850, requesting reclassification from the R-60 and CBD-1 Zones to the TS-M Zone of approximately 3.3 acres of County-owned land on the southwest and southeast quadrants of the intersection of Bethesda and Woodmont Avenues (Lots 138, 139 and parts of Lots 18 – 24, Block B of the Miller's Addition Subdivision) in Bethesda, in the 7th Election District, be **approved** in the amount requested and subject to the specifications and requirements of the revised Development Plan, Exhibit 66(a), provided that the Applicant submits to

the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council within 10 days of approval, as required under Code §59-D-1.64.

Dated: September 7, 2006

Respectfully submitted,

Martin L. Grossman
Hearing Examiner